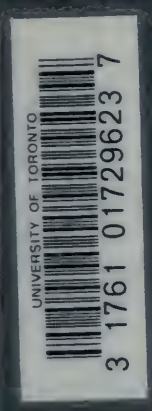

Walkem, Richard Thomas
The Married Women's Property Act of Ontario

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John Marshall
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1886

THE

MARRIED WOMEN'S PROPERTY ACTS

OF ONTARIO:

BEING

Con. Stat. U.C., c. 73; 35 Vict., c. 16, Ont., and 36 Vict., c. 18, Ont.

WITH NOTES OF THE ENGLISH AND CANADIAN CASES BEARING UPON THEIR CONSTRUCTION, AND OBSERVATIONS RESPECTING THE INTERESTS OF HUSBANDS IN THE PROPERTY OF THEIR WIVES.

TO WHICH IS ADDED

AN APPENDIX

CONTAINING THE EARLIER STATUTES RELATING TO THE CONVEYANCE BY MARRIED WOMEN OF THEIR REAL ESTATE.

BY

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PREFACE.

THIS work has been compiled with the object of aiding the profession and others in the examination and construction of the "Married Women's Property Acts" of this Province.

The effect of these Acts is to give to wives rights and privileges utterly opposed to the principles and policy of the Common Law of England. The prudence of these concessions has been doubted by many, who, whilst acknowledging that the old law was neither just nor satisfactory, contend that the changes effected by the recent Acts are too radical in their character, and are opposed to the principles of sound policy, as being calculated to disturb that harmony which should exist between husband and wife. They allege that the powers and privileges conferred on wives by 35 Vict., c. 16, are inconsistent with the duties, moral and domestic, which they owe to their husbands and children, and are repugnant to the natural law which governs the relations between husband and wife.

It is conceived, however, that these objectors have underrated, or lost sight of, the restraining power of that natural law to which they refer, and have not sufficiently estimated the tact and capacity of the gentler sex; and it will probably be found in practice that the privileges conferred upon wives by the Act will seldom be abused, and will be used only as a shield against oppression or injustice.

But if there are some who take exception to the principles on which our "Married Women's Property Acts" are founded, there are many more who find fault with the manner in which they have been framed. They are said to be obscure and difficult of construction, and inharmonious with each other, and with the law as administered by the Courts of Equity. Conceiving this to be

the general opinion, I have thought that a work such as this would be of service to the profession. In it I have collocated the various Acts respecting Married Women's Property, so that they may be conveniently examined and compared each with the other; and I have, in the notes, referred to the cases decided upon their construction, and upon the Imperial Statutes on which they are founded.

Into the introductory chapter I have embodied a short sketch of the old law respecting the marital interests of husbands in the property of their wives, which, I trust, will be found useful; and I have also extracted from the most recent authorities, the doctrines of the Courts of Equity upon the important subject of the wife's "separate use." A thorough acquaintance with those doctrines is an indispensable preliminary to an effective study of the "Married Women's Property Acts."

In the Appendix will be found the statutes of this Province in force prior to 36 Vict., c. 18, relating to the conveyance by married women of their real estate.

The decisions upon cap. 73 of Con. Stat. U. C., will be found useful in construing the later statutes, and they are, therefore, fully referred to in the notes to that Act. The statute 35 Vict., c. 16, not being retrospective, except, perhaps, to the extent laid down in *Merrick* vs. *Sherwood*, the pre-existing Acts must still be referred to in considering the rights of married women with respect to their property.

I have not ventured, in the absence of authority, to express any decided opinions upon doubtful points; but I have drawn attention to many of those points, and have offered suggestions respecting them which will, I trust, be found useful.

R. T. W.

JUNE, 1874.

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MARRIED WOMEN'S PROPERTY.

INTRODUCTION.

Wife's chattels personal in possession, formerly vested in husband by the marriage.

It was the law of this Province when the Statute 22 Vict., c. 34(*a*), was passed, that the chattels personal in possession, including goods or specific chattels outstanding in the hands of third parties, belonging to the wife in her own right at the time of the marriage, or acquired by her during the coverture, became, by virtue of her marriage, the property of her husband absolutely.

Blackstone's reason for this rule.

The right of the husband to his wife's personal property is said by Blackstone to have been founded on the principle, that the existence of the wife became, by the marriage, merged or incorporated into that of the husband, and was, during the coverture, entirely suspended; the husband and wife were considered to be but one person(*b*).

Principle and effect of coverture.

This principle is, however, limited, as otherwise it must conflict with the principle of *coverture*, whereby the wife is regarded as distinct from her husband, but so entirely under his power and control, that she can do nothing of herself, but everything by his licence and authority(*c*).

Wife's outstanding chattels personal not vested in husband unless reduced into possession.

But the chattels personal outstanding belonging to the wife did not vest in the husband, unless reduced into *possession* by him, possession appearing to have been absolutely essential; and therefore, the wife's choses in action did not become the property of the husband. 'These,' says Blackstone, "the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. But if he dies before he has

(*a*) Con. Stat. U. C. c. 73.
(*b*) 2 Black. Comm. 433.
(*c*) Macq., Husb. and Wife, 18.

recovered or reduced them into possession, so that, at his death, they still continue choses in action, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them"(*a*).

tement of the by Sir Thos. mer.

The interest of a husband in his wife's choses in action, was clearly defined by Sir Thomas Plumer, in the case of *Purdew* v. *Jackson*(*b*). That painstaking judge remarks: "I have always understood that the marital right of a husband to the choses in action belonging to the wife, is a qualified, and not an absolute right. It is a right depending upon, and subject to, a condition which is spoken of in the books uniformly in the same terms. Their language invariably is, that the husband is entitled to such choses in action of the wife, as he reduces into possession, and that reduction into possession is a condition upon which alone the law gives them to him. 'Marriage,' says Lord Coke(*c*), 'is an absolute gift of all chattels personal in possession in her (the wife's) own right, whether the husband survives the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them, unless he and his wife recover them.' The doctrine is stated in the same way, by a late respectable text writer, who, in a discussion of considerable length, has called in question the soundness of the decision in *Hornsby* v. *Lee* (*d*). 'Marriage,' says Mr. Roper, 'is only a qualified gift to the husband of the wife's choses in action, viz.: upon condition that he reduce them into possession during its continuance; for, if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it(*e*).'"

stinction between wife's attels personal tstanding, and ecific chattels hands of third rties.

The wife's chattels personal outstanding, or choses in action, must be carefully distinguished from her goods, or specific chattels in the hands of third parties, which, as we have seen, became the property of the husband by virtue of the marriage, and for the recovery of which the husband might, in his own name alone, bring an action of detinue, replevin, or trover(*f*).

(*a*) 2 Black. Comm. 434.
(*b*) 1 Russ., at p. 24.
(*c*) Co. Lit., 351 b.
(*d*) 2 Madd. 16.
(*e*) Roper, Husb. and Wife, 202.
(*f*) Macq., Husb. and Wife, 20, 47.

Husband's interest in wife's reversionary choses in action.

The husband had no power in himself, nor had husband and wife jointly the power of so disposing of the wife's interest in her reversionary choses as to bar her right by survivorship, if such interest was incapable of being reduced into possession in the husband's lifetime(*a*). And where a reversionary interest belonging to the wife was assigned by the husband, at a time when he had not the power of reducing the interest into possession, the assignment was void against the wife claiming by survivorship, though, before the husband's death, the interest became capable of being reduced into possession(*b*).

Wife's equity to a settlement.

The right of a husband to recover or dispose of his wife's choses in action was subject to a further limitation, called the wife's equity to a settlement. Whenever the husband, or his assignee, was obliged to seek the aid of Equity in order to get the benefit of the wife's property, the assistance of the Court was withheld, until, if the wife required it, a provision for her was secured out of the fund sought to be recovered(*c*).

Husband's interest in wife's chattels real.

In the chattels real of the wife, the husband acquired by the marriage an absolute property, fettered, however, by some peculiar restrictions. He might make an absolute disposition of them during the coverture; but, if he did not exercise this right, and his wife survived him, they reverted to her. He could make no disposition of them by will which would be effective against the wife's right, if she survived him; but, if he survived his wife, they became his absolutely(*d*).

Effect of marriage on wife's real estate.

The interest which a husband acquired in his wife's real estate upon marriage was of a character much less ample than that which he acquired in her personal estate. The fee simple in her real estate remained in her, but the husband by the marriage acquired a freehold interest therein, for their joint lives, both being seized together in her right by entireties; and, upon birth of issue of the marriage, the husband's interest became enlarged into an estate for his own life—the estate by the curtesy.

Blackstone's opinion as to wife's disabilities.

The disabilities of married women created by coverture, being, as Blackstone remarks, "intended for the wife's benefit," are cited by him as a proof of the high favour in

(*a*) Stiff *v.* Everett, 1 Myl. & Cr., 37; Purdew *v.* Jackson, 1 Russ. 1.
(*b*) Ashby *v.* Ashby, 1 Coll. 553.
(*c*) Macq., Husb. and Wife, 71.
(*d*) Macq., Husb. and Wife, 23.

which the female sex was held by the laws of England. The wholesale transference of her property to her husband may probably be regarded as another proof, establishing the same theory, the wife being, by operation of those laws, relieved from the cares and troubles incident to the ownership of property.

Origin of separate use.

In or about the time of Queen Elizabeth, there struggled into existence a weakly creature, which, in later times, when it has attained form and maturity, has been called "separate use." The Court of Chancery is responsible for the creation of this married women's protector. Lord Westbury, speaking of the establishment of the doctrine of separate use, in the case of *Woodward* v. *Woodward*(*a*) observed, "It is a remarkable instance of legislation by judicial decision;" and, in another case(*b*) the same eminent judge remarked: "The violence thus done by Courts of Equity to the principles and policy of the common law, is very remarkable, but the doctrine is established, and must be consistently followed to its legitimate consequences." Separate use is, in fact, the result of a stretch of legislative authority on the part of the Court to which few parallels can be found. From the time of its first establishment, it has gradually been developed until it has assumed the proportions of a system. At first, it was so tied and bound as to be unable to exert its full strength, but its fetters have been slowly and hesitatingly removed by successive judges, and it now forms an important part of Equity jurisdiction.

Power of disposition over separate estate.

It is not necessary for our purpose to trace the steps by which the doctrine of separate use has reached its full establishment. It is sufficient to say, that a married woman has now an absolute power of disposition by act *inter vivos*, or by will, over her personal property, settled to her separate use, whether in possession(*c*) or in reversion(*d*), and over her life interest in the rents and profits of her real estate *e*).

Wife may dispose of her equitable interest in separate estate.

The recent case of *Taylor* v. *Meade*(*f*) established a married woman's right to dispose absolutely by deed unacknowledged, or by will, of the equitable fee simple in

(*a*) 9 Jur., N. S. 882.
(*b*) Taylor *v.* Meade, 11 Jur., N. S. 166.
(*c*) Fettiplace *v.* Gorges, 1 Ves., 45.
(*d*) Sturgis *v.* Corp., 13 Ves., 190.
(*e*) Stead *v.* Nelson, 2 Beav., 245.
(*f*) 11 Jur. N. S. 166; 34 L. J., Ch. 203.

real estate, vested in trustees for her separate use; and in *Hall* v. *Waterhouse*(*a*) V.-C. Stuart decided that the interposition of trustees was not necessary to secure those rights to the wife.

In *Pride* v. *Bubb*(*b*), Lord Hatherley said, 'It cannot now be disputed, that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a feme sole, so as to be able to dispose of that estate by will or deed.'

Wife's power of binding her separate estate by contract.

The power of a married woman to dispose of her separate estate by will or deed is by these cases clearly and definitely established; but her power of disposition may be exercised otherwise than by will or deed. She may bind her separate real estate by contract, so as to entitle the person with whom she deals to enforce specific performance of her agreement(*c*); and she may also make her separate estate responsible for her general engagements, provided such engagements are made with reference to, and upon the faith or credit of, that estate, a question to be judged of upon all the circumstances of the case(*d*).

Separate use recognized only in Courts of Equity.

We are speaking now, it will be remembered, of the doctrines established by the Courts of Equity with respect to separate estate, and without reference to the provisions of Con. Stat. U. C., c. 73, or 35 Vict., c. 16. These doctrines were recognized and acted upon only in the Equity Courts. The judgment of Mr. Justice Gwynne, in the late case of *Merrick* v. *Sherwood*(*e*), contains a most instructive review of the equitable doctrines regarding the power of married women to bind their separate estate by their general engagements.

Statement of the law by Gwynne, J., in Merrick v. Sherwood.

That case arose upon the Statute 35 Vict., c. 16, "The Married Women's Property Act, 1872," and will be referred to hereafter in the notes upon that Act. The learned Judge observes(*f*), "For the purpose of our judgment in this case, we must take it as concluded by the verdict of the jury that, as was sworn on behalf of the plaintiffs, the goods sold and delivered to Mrs. Sherwood, the defendant, for which this action was brought, were so sold and

(*a*) 11 Jur. N. S., 361; 13 W. R., 633.
(*b*) L. R., 7 Ch. App. 64.
(*c*) Gaston v. Frankum, 2 De G. & Sm. 561; Picard v. Hine L. R. 5 Ch. Ap. 274.
(*d*) Per Lord Justice Turner, in Johnson v. Gallagher, 3 De G. F. & J. 494; 7 Jur. N. S. 273.
(*e*) 22 U. C. C. P., 467.
(*f*) At p. 469.

delivered upon the express understanding that they should be paid for by herself out of her separate estate, and upon the faith and credit of that estate. Proceeding upon this assumption, it becomes important to consider what the rights of the plaintiffs were in Equity before the statute of Ontario, 35 Vict., c. 16.

Case of Murray v. Barlee.

"In *Murray* v. *Barlee*(*a*), Lord Chancellor Brougham, after reviewing the authorities up to that time, pronounces the doctrine of the Court to be, after much vibration of opinion, that it requires only to be satisfied that the married woman intended to deal with her separate estate, in order to make it liable for her engagements; when she appears to have done so, the Court holds her to have charged it, and will make her trustees answer the demand thus created: and this he pronounces to be the doctrine of the Court, although the married woman becomes indebted without executing any written instrument at all.

Owens v. Dickenson.

"In *Owens* v. *Dickenson*(*b*), Lord Cottenham, adopting the language of Lord Thurlow in *Hulme* v. *Tenant*(*c*), says, 'The separate property of a married woman, being a creature of Equity, it follows that if she has a power to deal with it, she has the other power incident to property in general—namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied.'

Leading case of Johnson v. Gallagher.

"But the judgment of Lord Justice Turner, in *Johnson* v. *Gallagher*(*d*), wherein he reviews all the authorities upon this subject, is now regarded as establishing the doctrine of the Court upon a firm basis. It is the touchstone to which all cases upon this subject must now be brought.

Express charges.

He there says(*e*): 'It has not, so far as I am aware, ever been disputed that married women may encumber their separate estates by mortgage or charge.' And with reference to the disputed point, whether the separate estates

General engagements.

of married women are liable for their general engagements, such as tradesmen's bills, and claims of that de-

(*a*) 3 My. & K. 209.
(*b*) 1 Cr. & Ph. 48.
(*c*) 1 B. C. C. 16.
(*d*) 3 De G. F. & J. 494; 7 Jur. N. S. 273.
(*e*) P. 510.

scription, he says: 'Looking at this question without reference to authorities, it is difficult to see upon what ground debts of this class can be distinguished from debts of the class to which I have last referred; what distinction there can, for this purpose, be between debts by specialty and debts by simple contract; and still more, what distinction there can be between simple contract debts of different descriptions; and, if no sound distinction can be drawn between the different classes of debts, the authorities which apply to the one class must, as it should seem, govern the other.' He then reviews the authorities, and comes to the conclusion that the separate estate of a married woman is liable to her general engagements; but he adds, 'I am not prepared, however, to go the length of saying that the separate estate will in all cases be affected by a mere general engagement.' And, referring to *Jones* v. *Harris*(*a*), and *Aguilar* v. *Aguilar*(*b*), he says: 'It seems to follow that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract; for neither in law nor in equity can a married woman be bound by contract merely!' And he concludes by saying: 'According to the best opinion which I can form of a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that *the engagement was made with reference to, and upon the faith or credit of that estate, and that whether it was so or not, is a question to be judged of by this Court upon all the circumstances of the case.*'

Exception under Statute of Frauds.

Requisites to bind the separate estate.

"The Master of the Rolls, it is true, in *Shattock* v. *Shat-*

Case of Shattock v. Shattock.

(*a*) 9 Ves. 493.
(*b*) 5 Madd. 414.

tock(*a*), disputes the accuracy of the conclusion arrived at by Lord Justice Turner in the above case, as to the liability of the married woman's separate estate to 'general engagements;' but in so far as the case before us is concerned, the doctrine as stated by the Master of the Rolls leads to the same conclusion as that of the Lord Justice. At page 188 the Master of the Rolls says: 'The principle of the Courts of Equity relating to this subject (the liability of a married woman in respect of her separate estate) in my opinion is, that, as regards her separate estate, a married woman is a feme sole, and can act as such; but only so far as is consistent with the other principle—namely, that a married woman cannot enter into a contract. These principles are reconciled in this way: Equity attaches to the separate estate of the married woman a quality incidental to that property, namely, a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject matter that she deals with; and, therefore, if she makes a contract, the contract is nothing unless it has reference, directly or indirectly, to that property. This is, in my opinion, the extent of the doctrine of Equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, and promise to pay, given by a married woman has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if Equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate, she may bind herself by contract exactly as if a feme sole; or, in other words, that the possession of separate property takes away the distinction between a feme covert and a feme sole, and makes them equally able to contract debts.'

Matthewman's case.

"In *Mrs. Matthewman's case*(*b*), Kindersley, V.-C., held that a married woman, having separate estate, and who had contracted to take shares in her own name in a joint

(*a*) L. R. 2 Eq. 182.
(*b*) L. R. 3 Eq. 781.

stock company, was liable to be placed on the list of contributors, so as to bind her separate estate. He adopts to the fullest extent the doctrine as laid down by Lord Justice Turner, in *Johnson* v. *Gallagher*(*a*). He says(*b*) 'What is the law as to the extent to which a married woman may contract obligations, engagements, or debts, which the party with whom she is contracting may insist shall be paid out of her separate estate? That is a moot question, but I think the principle laid down by Lord Justice Turner, in *Johnson* v. *Gallagher*(*c*), is a sound one, and that it is the principle which the Court ought to adopt. As I understand that principle, it is this: If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a feme sole, would constitute her a debtor, and in entering into such engagement, she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question, whether the obligation was contracted in the manner I have mentioned, must depend upon the facts and circumstances of each particular case. It clearly is not necessary,' he goes on to say, 'that the contract should be in writing, * * * nor is it necessary that there should be any express reference made to the fact of there being such separate estate. * * * If the circumstances are such as to lead to the conclusion, that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation.'

"In *Butler* v. *Cumpston*(*d*), Malins, V.-C., followed the decision in *Mrs. Matthewman's case*, and expressed his entire concurrence in it, and in the whole doctrine as laid down by Lord Justice Turner. Butler v. Cumpston.

"In *Woodward* v. *Woodward*(*e*), it was held that a married woman may, in Equity, sue her husband to recover a Woodward v. Woodward.

(*a*) 3 De G. F. & J., 494.
(*b*) At page 786.
(*c*) 3 De G. F. & J., 494.
(*d*) L. R. 7 Eq. 16.
(*e*) 9 Jur. N. S. 882.

loan made to him by her out of her separate estate. Lord Chancellor Westbury there says: 'Wisely or unwisely, this Court has firmly established the independent personality of a feme covert with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision.'

Picard v. Hime.

"But in a recent case before Lord Chancellor Hatherley, and the Lord Justice Giffard, in 1869(*a*), the doctrine laid down by Lord Justice Turner is recognized as the established doctrine of the Court. Lord Hatherley there says, 'We both think it very desirable that the position of a married woman who contracts as if she were a feme sole should be placed upon a well-understood basis; and we think that that has been done by Lord Justice Turner in his judgment in *Johnson* v. *Gallagher*(*b*). There has been much discussion,' he says, 'as to the precise mode in which a married woman's estate could be affected by anything except actual disposition. It was strongly felt by the Court, that there was great injustice in protecting a married woman, and allowing her to deprive others of their property, by entering into engagements which she must have known herself unable to fulfil in any other way than out of her separate estate, though the Court seems to have felt some difficulties as to the manner in which the separate estate could be reached. At one time it was held, that an appointment would be inferred, but Lord Cottenham, in *Owens* v. *Dickenson*(*c*), disposed of that by saying, that, if so, the creditors must take in the order of the appointments. All these theories have been given up, and the doctrine has been placed upon a sound foundation by the decision in *Johnson* v. *Gallagher*(*d*).' And he adds, 'When she, (a married woman), by entering into an agreement, allows the supposition to be made, that she intends to perform the agreement out of her property, she creates a debt which may be recovered, not by reaching her, but by reaching her property.'

Decision in Johnson v. Gallagher approved.

"And Lord Justice Giffard says, 'As to the law of this case, it is unnecessary to say anything, because, in the judgment of the Lord Justice Turner, in *Johnson* v. *Gallagher*(*e*), everything relating to the subject is clearly laid

(*a*) Picard *v.* Hine, L. R. 5 Ch. App. 274.
(*b*) 3 De G. F. & J. 494.
(*c*) 1 Cr. & Ph. 48.
(*d*) 3 De G. F. & J. 494.
(*e*) 3 De G. F. & J. 494.

down, and it amounts in substance to this: that a creditor having a claim against a married woman, can come here and assert and enforce an equity as against her separate estate.'

Deduction from the various cases—statement of present doctrine of Equity.

"The undoubted law, then, independently of any statute is, that where goods are sold and delivered by a tradesman to a married woman upon her express promise to pay out of her separate estate, and upon the faith and credit of that estate, the vendor becomes her creditor, and she alone, and not her husband, the debtor; the transaction creates a debt due by the married woman alone, although it was enforceable in Equity only, and only against the separate estate."

Apathy of Legislature as to legal status of married women.

Thus stood the law as administered by the Court of Chancery in this Province in the year 1859. The Courts of Equity having supplied those improvements in the status of married women which progress imperatively demanded, the Legislature stood still and did nothing. At length, however, it was felt that a change should be made in the *legal* position of the wife with respect to her property and civil rights; and, accordingly, the statute 22 Vict., c. 34(*a*) was passed, the provisions of which will receive attention hereafter. The preamble to this statute admits the injustice of the existing law, in the following words: "Whereas, the Law of Upper Canada relating to the property of married women, is frequently productive of great injustice, and it is highly desirable that amendments should be made therein, for the better protection of their rights, therefore, &c." Thirteen years afterwards, was passed "The Married Women's Property Act, 1872"(*b*), a statute founded upon the Imperial Act, 33 & 34 Vict., c. 93. These Acts effect a complete change in the legal status of married women, giving them rights and privileges utterly opposed to the principles and policy of the common law. By a few short sections, the married woman is rescued from that insignificance to which the old law consigned her; and, fully equipped with legal weapons, she is raised to that position to which modern society considers her entitled.

22 Vict., c. 34.

Preamble to that Act.

"Married Women's Property Act 1872."

Though the statute 35 Vict., c. 16, was founded upon the Imperial Act 33 & 34 Vict., c. 93, it will be seen, on a comparison of the two statutes, that the rights and privi-

Difference between our own and the Imperial Acts.

(*a*) Con. Stat. U. C. c. 73.
(*b*) 35 Vict. c. 16.

leges conceded to married women by the former, are much more ample than those conferred by the latter Act; and, on the other hand, the Legislature of this Province has attached to the privileges conferred responsibilities which are not to be found in the Imperial Act.

Power conferred on wife as to her real estate by our Act.

By our statute, the wife obtains a substantially absolute power of disposition over her real estate, which is relieved, at least during her lifetime, from the interests which the husband formerly acquired therein. By the Imperial Act, the rents and profits *only* of real property which *descends* to the wife are secured to her, the husband's interests in such real estate being in other respects unaffected.

By Imperial Act.

Wife's earnings and acquisitions from trade, &c.

By our statute, the wife's personal earnings and her gains from trade carried on by her separately from her husband, or from any literary, artistic, or scientific employment, are given to her absolutely. The same classes of property are also given to the wife by the Imperial Act; but, in addition thereto, that Act provides that the wife shall have for her separate use, any unsettled personal property to which, during her marriage, she may be entitled as next of kin of an intestate, or any sum of money, not exceeding £200, to which she may become entitled by deed or will. The absence of some such provision from our own statute is somewhat remarkable, and can be accounted for only upon the hypothesis that the provisions of Con. Stat. U. C. c. 73 were considered to be sufficient to secure to a married woman the due enjoyment of her general personal property(*a*).

Provisions in Imperial Act as to wife's general personal property.

Defect of our Act in this respect.

Insurance by wife of her own or her husband's life.

Both statutes enable a wife to insure her own or her husband's life; and both provide for the wife the most ample protection in respect of such insurance as against the husband or his creditors. Our statute, however, requires the consent of the husband to be given to an insurance effected by his wife on his life, a consent which is not required by the English Act. A married woman is enabled by our Act to become a stockholder, or member of any incorporated company, or association, and the Act confers on her the same rights as other members, including the right of voting. The rights of married women as stockholders in the public funds, or in any incorporated or joint stock company, or in friendly, building, or loan societies, are also protected by the Imperial Act, which

Married women enabled to become stockholders, &c.

(*a*) See on this subject the Notes to s. 1. Con. Stat. U. C. c. 73.

provides that the shares held by any married woman, or any woman about to be married, shall, on her requisition, be entered or registered in the books of the company in which such shares are held in her name, or intended name, for her separate use, after which transfer, such shares are to be deemed her separate property. The Imperial Act does not, however, expressly confer on married women the right of voting, or the same rights generally as other shareholders.

Rights of husband's creditors preserved.

The right of creditors to follow investments made by the wife of the husband's money, in fraud of his creditors, is preserved by both statutes.

Remedy by summary application, provided by Imperial Act.

A summary remedy by application by summons or motion to the Court of Chancery, is provided by the Imperial Act for the settlement of disputes between husband and wife, respecting property declared by the Act to be the separate property of the wife; but no such remedy is provided by our statute.

Husbands relieved from payment of wife's debts incurred before marriage.

Husbands are relieved by both statutes from the payment of the wife's debts contracted before marriage; and provision is made that the wife may be sued therefor and her separate property made available for the payment of such debts; and our Act further proceeds to relieve the husband from responsibility for debts contracted by his wife in respect of any employment or business in which she is engaged on her own behalf, and from responsibility in respect of the wife's own contracts.

Wife's business contracts.

Remedies given to wife for the protection of her property.

Both statutes also give power to the wife to maintain civil or criminal proceedings for the protection of her separate property; but the correlative liability of being sued is imposed on the wife by our statute only, provision being thereby made that a married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried.

Burdens imposed on wife by Imperial Act.

Lastly, the Imperial statute imposes on a wife having separate property, a liability to contribute to the support of her husband in the event of his becoming chargeable on any union or parish, and the same liability for the maintenance of her children as a widow is by the English law subject to for the maintenance of her children.

Comparison of the two Acts.

On the whole, it would appear that the changes effected by our statute, are more radical in their character than

those effected by the Imperial Act. In this Province, the doors of the courts are thrown open to married women, who are permitted to enter them unaccompanied by their husbands or next friends; but of still more importance are those provisions of the Act which relieve the husband from responsibility in respect of his wife's engagements, and which confine that responsibility to her alone.

The married women's real estate Act, 1873.

During the session of 1873, a statute was passed by our Legislature which may be regarded as the complement of the previous Acts, respecting the property of married women. This Statute, "The Married Woman's Real Estate Act, 1873," is intended to facilitate the conveyance by wives of their real estate, and it abolishes the time-honoured ceremony of separate examination.

Separate examination abolished.

Wife may convey her real estate by deed, her husband must be a party.

A wife may now, without acknowledgment, convey her real estate by deed, to which her husband is a party. Keeping in view the powers indirectly conferred on married women by the Act 35 Vict., c. 16, with respect to their real estate, and assuming that these powers are not affected by the new Act, it is difficult to conceive why the husband's concurrence should be necessary in a conveyance of the legal estate in the wife's lands. If she can convey the equitable estate without his concurrence, why should his concurrence be required for the conveyance of the legal estate? Surely this provision can be regarded only as an empty concession to the prejudices of those who did not approve of the principle on which the statute 35 Vict., c. 16, was founded.

Courts authorized to dispense with husband's concurrence in certain cases.

Provision is made by the Act for the relief of married women when their husbands are incapable of executing deeds, or when the husband's residence is unknown, or he is a prisoner, or is living apart from his wife by mutual consent. In all these, and in other cases, upon good cause shown, a judge may, by order, on the application of a wife who desires to convey her real estate, dispense with the husband's concurrence in the proposed conveyance. This provision has been adopted from the Imperial statute, 3 & 4 W. 4, c. 74, s. 91.

Defective conveyances validated.

Provision is also made for the validation of defective conveyances theretofore made by married women. The policy of such a provision may be questioned; and it will probably be found, that the protection to subsequent purchasers, afforded by the 13th section of the Act, is by no means adequate.

AN ACT

RESPECTING

CERTAIN SEPARATE RIGHTS OF PROPERTY

OF

MARRIED WOMEN.

CON. STAT. U. C., CAP. LXXIII.

A married woman may hold her property free from the debts or control of her husband.

1. Every woman, who has married since the Fourth day of May, one thousand eight hundred and fifty-nine, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate or in any other way after marriage, free from the debts and obligations of her husband and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding: but this clause shall not extend to any property received by a married woman from her husband during coverture. 22 V. c. 34, s. 1 (1859) (*a*).

Proviso.

Scope of 1st and 2nd sections.

The words of the first and second sections are very wide and include all classes of property of the married woman. The subsequent statute 35 Vict., c. 16 is limited, certain classes of property only being mentioned in the Act(*b*).

General effect of the Act.

The general effect of the Act has been stated to be to create a settlement to the separate use of every married woman within its

(*a*) For a statement of the law as it stood when the Act was passed, see *ante*.
(*b*) See sections 1 and 2, 35 Vict., c. 16.

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scope, to be dealt with as one made by a proper conveyance to trustees before marriage for the use of the intended wife(*a*).

Settlement effected by Act of limited character.

But the settlement thus effected is of a peculiar and limited nature. The married woman's power of disposition in respect of this parliamentary property is not at all analogous to her power of disposition in Equity over property settled to her sole and separate use. The property of the wife under this Act is altogether the creature of the statute, and the Act must alone be looked at to ascertain the extent of her power of disposition over the property thereby settled(*b*).

Independent power of disposition by wife, chief characteristic of separate estate.

The power of disposition without the consent of the husband is, as we have seen(*c*) one of the chief characteristics of separate estate in Equity. This power of disposition is not, so far at least as their real estate is concerned, conceded by this Act to married women.

Con. Stat. U. C., c. 85, s. 15.

By 22 Vict., c. 35, s. 6, now section 15 of Con. Stat. U. C., c. 85, it was provided that "The requirements necessary to give validity at law to a conveyance by a married woman of any of her real estate with respect to deeds of conveyance executed since the fourth day of May, one thousand eight hundred and fifty-nine, or after the passing of this Act, shall continue to be necessary for that purpose, notwithstanding anything contained in the five last preceding sections of this Act. But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman executed since the said fourth day of May, one thousand eight hundred and fifty-nine, or which may after this Act takes effect be executed in respect of her real estate." This statute was passed during the same session of Parliament as the "Married Woman's Act."

Emrick *v.* Sullivan—interest of husband in wife's real estate, how affected by Act.

In *Emrick* v. *Sullivan(d)*, Chief Justice Draper suggested that the words of the 13th section of chapter 73 implied that, by virtue of the marriage, the husband acquired other estates and interests in the wife's real estate, than the right, on birth of issue, as tenant by the curtesy, which is expressly recognized and preserved by the 4th section, "for otherwise," he remarks, "the provision (in the 13th section) that such estate or interest should not be subject to his debts, would be useless. During the wife's life his estate or interest as tenant by the curtesy would not be consummate, and could not be made so subject; and therefore we apprehend the statute must refer to the estate he has as being jointly seized with his wife, and in her right, during the coverture, of her real estate, and then he is a necessary party to the conveyance of such estate; and, at common law, the husband alone could lease for a term. But, independently of this suggestion, we are clearly of opinion this statute has not changed the law as to the conveyance by married women of their real estate. It enables a married woman to have, hold and enjoy her real estate free from the debts and obligations of her husband, but it leaves the law as to the conveying such estate untouched.

Estate by the curtesy.

Law as to conveyance of wife's real estate not changed by the Act.

(*a*) Lett *v.* The Commercial Bank, 24 U. C. Q. B., per Draper, C. J., at pp. 555 and 558. See also the observations of Adam Wilson, J., Leys *v.* McPherson, 17 U. C., C. P. 273.

(*b*) Per Gwynne, J., in McGuire *v.* McGuire, 23 U. C., C. P. at p. 129. See also the observations of V.-C. Strong, in Mitchell *v.* Weir, 19 Grant 568.

(*c*) Ante p. 4-6.

(*d*) 25 U. C. Q. B., at p. 107.

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Except where the statute directly interferes, we apprehend the law as to husband and wife continues as it was before." The effect of the Act was fully considered by the present Chancellor (Spragge) in the case of *The Royal Canadian Bank* v. *Mitchell*(*a*), the decision in which has been approved of in subsequent cases. In considering what power was given by the Act to married women to charge their estate by their engagements or contracts, the learned Judge observes(*b*), "The general scope and tenor of the Act is to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities, except in the case of her *torts*, and of her debts and contracts before marriage. The change made in the 14th section applies with peculiar force to the case before me. It is an unmistakable manifestation of intention that the separate estate of married women shall be liable only upon debts incurred or contracts made before marriage. What the Legislature meant by *separate property*, it is not necessary to inquire." The learned Judge then referred to the provisions of 22 Vict., c. 35, s. 6 (*c*), above quoted, and he thus proceeds, "In *Emrick* v. *Sullivan* (*d*), the Court declared it to be clearly their opinion that the Married Woman's Act has not changed the law as to the conveyance by married women of their real estate. The clause in chapter 35 was not referred to; if it had been, the point would have been too clear for argument; but the Court decided it (and I agree with them) upon the construction of the Married Woman's Act itself. The qualification in the clause that it shall not affect any other remedy cannot, of course, operate to create a new remedy; it simply left the deeds and contracts of a married woman to have the same operation and effect as before." At p. 420, the learned Judge observes, "When we look at the principle upon which it is held in England, that the separate estate of a married woman is liable upon her contracts, it is clear that the real property of a married woman is not made liable by the Act. The Act confers upon such property, certain qualities incident to separate estate, but it withholds that quality which is the very foundation of the English decisions, the *jus disponendi*. The principle of the decisions is—that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being not personally liable upon her contract, is presumed to contract with reference to her separate estate, and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly. In this, I apprehend, lies the whole point of the case. But there is another provision in the Act which shews that it is only *sub modo*, if at all, that it makes the real property of the wife separate estate, for it recognizes an estate and interest in the husband during coverture, and provides that it shall not, during her life, be subject to his debts. It is of the essence of separate estate, that the husband has no estate or interest in it. My construction of the Married Woman's Act is, that it gives to what Lord

Royal Canadian Bank *v.* Mitchell, Opinion of Spragge, V.-C.

Emrick *v.* Sullivan.

Wife's real estate not made liable by the Act for her contracts.

Jus disponendi withheld from wife.

Husband's interest during coverture in wife's real estate recognized by the Act.

Construction of the Act.

(*a*) 14 Grant, 412.
(*b*) At p. 419.
(*c*) Con. Stat. U. C., c. 85, s. 15.
(*d*) 25 U. C. Q. B., 105.

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Westbury calls the ordinary equitable estate of a feme covert, certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient probably, if found in a private instrument, to constitute a separate estate, but that, upon a proper construction of the whole Act, certain qualities incident to a separate estate are withheld, and what is all important among them, that quality upon which the decisions making the separate property liable for the married woman's contracts are founded."

Chamberlain *v.* McDonald.

In the subsequent case of *Chamberlain* v. *McDonald* (*a*), the Chancellor expressed his concurrence in the view of the Act taken by V.-C. Spragge, in *The Royal Canadian Bank* v. *Mitchell*. In

Wright *v.* Garden.

Wright v. *Garden*(*b*), Chief Justice Richards observes, "No express authority is given under the statute to a married woman to contract debts after marriage, and it seems conceded from the different provisions of the Act, taken together, and of the Con. Stat. U. C., c. 85, that she cannot convey her land except by a deed executed jointly with her husband, and acknowledged in accordance with the terms of the last mentioned Act."

Conclusion to be derived from the cases.

These cases, to which may be added the recent case of *McGuire* v. *McGuire*(*c*), establish conclusively that a married woman cannot dispose of or charge her real estate under the statute without the concurrence of her husband.

Effect of Act on wife's personal estate.

The question whether she can so dispose of her personal estate is one on which there appears to be a conflict of opinion. The language of Vice-Chancellor Spragge in the *Royal Canadian Bank*, v. *Mitchell*, applies to *real and personal* estate, and will justify the assumption that his opinion was, that a married woman could not dispose of her personal estate under the Act without her husband's consent. The approval in subsequent cases of the views expressed by the Vice-Chancellor gives strength to his opinion in this respect.

Balsam *v.* Robinson. Opinion of Gwynne, J.

In *Balsam* v. *Robinson*(*d*), Mr. Justice Gwynne, referring to the rights conferred by the Act on married women over their separate personal property during coverture, remarks (*e*): "I should hesitate before acceding to the argument, as I understand it to have been urged here. If it should prove to be the law, that the words in the Act, which vest all her real and personal property in herself, '*free from the debts and obligations* of her husband, and from his control and disposition *without her consent*,' are to be construed as giving to her absolute control and disposition *without his consent*, I fear the result may be to deprive her of the benefit of his advice and protection, while relieving her property from his obligations and control, and may expose her to the contrivances of designing persons, who may persuade her to make bargains and dispositions of her property highly prejudicial to the joint interests of herself and her husband. At present it seems to me that the object of the Act will be sufficiently secured if the law should prove to be, that she shall not have

(*a*) 14 Grant, 448.
(*b*) 28 U. C. Q. B., at p. 611.
(*c*) 23 U. C. C. P. 123.
(*d*) 19 U. C. C. P.
(*e*) At p. 269.

the power of disposition without the consent and intervention of her husband, so that he may have an interest, recognised in law, sufficient to enable him to prevent her making what may be improvident bargains in respect of it, and securing to her the same beneficial interest, as to the *corpus*, at least, of her personalty, as she has in her realty, which, notwithstanding that the word "real" is coupled with "personal" property in the Act, cannot be disposed of effectually, otherwise than jointly with her husband. Such a construction, I am inclined to think, would be more conducive to the preservation of her true interests and the peace of the marriage state, than one which would give to her absolute power of disposition without the consent, and, it may be, against the will and advice of her husband." SECTION 1.

In *Kraemer* v. *Gless*(*a*) Chief Justice Draper, referring to the provisions of the Act, remarks(*b*), "I do not perceive that any of these provisions, either in letter or spirit, require us to hold that chattel property, which belonged to the wife before marriage, is not, by the marriage, placed in the hands, and under the protection, of the husband, though no longer subject to his debts, or to his disposal." Kraemer v. Gless. Opinion of Draper, C. J.

On the other hand, V.-C. Mowat, in *Chamberlain* v. *McDonald*(*c*) suggested that, as to personal property, the wife might have a power of disposing of it independently of her husband; and in *Wright* v. *Garden*(*d*) Mr. Justice A. Wilson, after reviewing the provisions of the Act, stated his opinion to be that the personal separate estate of the wife (under the Act) in this country, is at her complete disposal, as it is in the Courts of Equity in England. And he further states his opinion to be, that the wife may, by contract, bind her present or future separate personal property. The learned judge admits, however, that his opinion is expressly opposed to the judgment of the Court in *Kraemer* v. *Gless*(*e*). Chamberlain v. McDonald. Opinion of Mowat, V.-C. Wright v. Garden. Opinion of A. Wilson, J.

In the recent case of *McGuire* v. *McGuire*(*f*) a married woman who had, without just cause, left her husband's house and was living apart, demanded from him chattels and household furniture which, having been her property before marriage, came into his possession upon and by virtue of the marriage, and had been used by them jointly in his dwelling house. The marriage took place in 1870. The husband refused the demand, and the wife brought trover against him. The Court held that under Con. Stat. U. C., c. 73, and 35 Vict., c. 16, the action could not be maintained. Mr. Justice Gwynne in that case, after referring to the provisions of 35 Vict., c. 16, and to the extended powers of disposition given to married women by that Act, states his opinion to be (*g*), that the passing of that Act is a conclusive legislative declaration that the right of *disposing* of their personalty had not been conceded to married women by Con. Stat. U. C., c. 73. The learned judge seemed to consider, that the last mentioned Act merely *protected* a married McGuire v. McGuire.

(*a*) 10 U. C. C. P. 470.
(*b*) At p. 475.
(*c*) 14 Grant, at p. 449.
(*d*) 23 U. C. Q. B. at p. 624.
(*e*) 10 U. C. C. P. 470. See also the opinion of the same Judge in *Halfpenny v. Pennock*, 9 Can. L. J. N. S. 309, Q. B; 33 U. C. Q. B. 229.
(*f*) 23 U. C. C. P. 123.
(*g*) At page 124.

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woman in the *possession* and *enjoyment* of her personal property, without giving her the right to *dispose* of it.

The weight of authority is, on the whole, against the right of the wife, under the Act, to dispose of her personal estate without the concurrence of her husband.

Wife's power of contracting not enlarged by the Act.

Kraemer v. Gless.

A wife's power of contracting is no more enlarged by the Act than is her power of disposing of her property. In *Kraemer* v. *Gless* (*a*), a married woman had made a promissory note, on which she was sued alone in a Division Court and a judgment recovered against her. Her property was seized under this judgment at the instance of the execution creditor, against whom the husband brought an action for the wrongful conversion of the goods, alleging the seizure to have been illegal. Chief Justice Draper, in delivering the judgment of the Court of Queen's Bench, holding the note void, states his opinion to be that the statute does not alter the power of a married woman to make contracts. "She is not enabled" he remarks(*b*), "to bind herself while a feme covert more than she could before it, (the Act,) was passed."

Linden v. Buchanan.

When a husband and wife, married in 1865, recovered judgment in a Division Court against one B. for rent due the wife for the occupation of land inherited by her from her father, and B. on the same day, recovered a judgment for a larger sum against the husband, the Court, on an application by B. for a set off, held that the wife was entitled to hold her judgment free from any of the claims of her husband's creditors, and refused the application(*c*).

Wife's power to act as administratrix, not enlarged by the Act.

The wife has no power under the statute to act as an administratrix independently of her husband. He has still the same power over all personal estate vested in her as administratrix as the common law gave him over such property vested in her in her own right; and if he exercises or permits her to exercise the powers vested in her as administratrix, in an improper manner, he is liable for a devastavit(*d*). He is, therefore, the person with whom any accord and satisfaction, in respect of a cause of action vested in the wife in her representative character, must be made, and he has an absolute right to interpose to prevent the completion of any negotiations for an accord which may have been entered into with her(*e*).

Bill of sale to wife before marriage not a settlement under the Act.

A bill of sale executed by a man a few days before marriage, assigning his furniture and household goods to his intended wife, in consideration of an agreement for such assignment, for the purpose of making a provision for her support and maintenance, was held not to be a contract or settlement within the meaning of the first section (*f*).

Object and nature of a marriage settlement explained.

The purpose of a settlement is to secure a separate estate to the wife, and most usually also it is made for the benefit of the issue of the marriage, apart from the control or obligations of the husband; and this is accomplished, and until the passing of our statute, could only have been accomplished by vesting the estate in some third person, as trustee for the wife, or wife and children. The effect of such a settlement, as commonly framed,

Estate must be vested in trustee for wife.

(*a*) 10 U. C. C. P. 470. (*b*) At p. 473. (*c*) Linden v. Buchanan, 29 U. C. Q. B., 1.
(*d*) See Addison on contracts, 1065, 693; Adair v. Shaw, 1 Sch. & Lef. 243.
(*e*) Per Gwynne J., in Balsam v. Robinson 19, U. C. C. P., at p. 266.
(*f*) Leys v. McPherson, 17 U. C. C. P. 266.

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and so far as concerns the wife, was to give her, substantially, the full exercise of all acts of ownership over the estate, as if she had been a feme sole and held the property in her own name. By such means she could sell the property, carry on trade with it, or dispose of it by will; because the trustee, in whose name the property was vested, held it for her use, and was obliged, within the provisions of the settlement, to do himself, and to permit her to do with the property whatever she pleased; and it was altogether exempt at law from the husband's debts. No conveyance or contract, which did not permit these or such like powers to be exercised, or which did not preserve at law the estate from the husband, and from his liabilities, and for the wife apart from the husband,—which did not, in fact, transfer the legal estate to some third person for her, was properly a marriage settlement (*a*.)

Effect of a settlement.

In *Lett v. The Commercial Bank* (*b*), Chief-Justice Draper intimated his opinion to be, that if a wife permits her husband to use property purchased with her separate moneys as his own, and to receive it into his possession, it may become his, and may be liable for the satisfaction of his debts. "I cannot," he says, (*c*) "permit a surmise even that the Act was intended to create a protection for the husband's dealings, which will operate as a fraud on the husband's creditors, nor do I find that the language compels a construction which would have this effect. I am not inclined to hold that, because the wife has separate estate, we are to treat the husband as her agent, clerk, or farm bailiff, having the interest of a servant or employé; nor that he can cover dealings from which his whole family derive a direct benefit, under the cloak that his wife furnishes all the money, and that he is a mere dependent on her bounty, and owns none of the property which he or those working on the place use in its cultivation, and to derive profit from it." And Chief-Justice Hagarty, in the same case, observes(*d*), "It can hardly be believed that the Legislature intended that a large amount of rents received by a married woman from her separate estate should be employed in buying a stock of goods, with which the husband might open a shop, and contract debts with various persons, and that neither the goods nor the moneys received from their sale could be touched by his creditors. The same remark might apply to farming on a large scale, stock-breeding, &c. It seems to me that the natural presumption, in cases like the present, would always be, and jurors would do well to act on it, that wherever chattel property, like farming stock, or implements, &c., are found in the visible use and disposition of a man, and it was shown that they had been bought or paid for with his wife's money, then, as to so much of her money, that it had been "controlled and disposed of" by the husband with the wife's consent, and the property which it had paid for had passed from the protection of the statute into the honest rule of the common law."(*e*) "It

Lett v. The Commercial Bank. Effects of Act on rights of husband's creditors.

If wife's chattel property is used by husband, it may be liable for his debts.

(*a*) Per Adam Wilson J., in Leys *v.* McPherson at p. 274. See also the remarks of Draper, C. J., in Lett *v.* The Commercial Bank, 24 U. C. Q. B., at p. 555, as to the effect of the Act on marriage settlements and the rights of the creditors of husbands.

(*b*) Sup. at p. 552.

(*c*) At page 559.

(*d*) At p. 561.

(*e*) The construction of this sentence is somewhat involved, and possibly the report may be incorrect.

SECTION 1.

is urged with great force that a married woman cannot 'have, hold, and enjoy,' her personal property 'in as full and ample a manner as if she were sole and unmarried,' if she may not buy what she pleases with her own money, and have flocks and herds, and ships and warehouses of her own as a single woman might. We have, however, to look at the entire statute, and cannot wholly ignore the rights of the husband, where the express words of the Act do not nullify such rights."

Possession of property by wife before marriage is *prima facie* evidence of ownership after marriage.

The proof of the possession by the wife, before marriage, of goods and chattels, is sufficient *prima facie* evidence of the wife's ownership, after the marriage, to support an action of trover brought by husband and wife for an alleged illegal seizure of the goods for rent due by the husband(*a*).

Husband responsible for goods supplied to wife to trade with.

Foulds *v*, Curtelett.

The Act effects no alteration in the husband's responsibility for goods supplied to his wife to carry on a separate business. In *Foulds* v. *Curtelett*(*b*), it appeared that the defendant, during several years prior to, and for part of the year 1862, had a shop, which he and his wife (who lived with him) attended, the shop being divided into two parts, in one of which the defendant carried on a confectionery and saloon business, and in the other, a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862 the defendant gave up the confectionery &c. business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him $5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionery &c. business there, though he was frequently seen on the premises. In 1869 the wife gave an order for the goods in question, just as she had always previously to 1862 been in the habit of doing. In an action against the husband for the price of these goods, the Court held that the business must be considered the defendant's business, that he was liable for the price of the goods, and that the Married Womans' Act(*c*), had no application to the case.

A woman married before 4th May, 1859, may hold property not reduced to possession of her husband.

2. Every woman who, on or before the said Fourth day of May, one thousand eight hundred and fifty-nine, married without any marriage contract or settlement, shall and may, from and after the said Fourth day of May, one thousand eight hundred and fifty-nine, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the said Fourth day of May, taken possession of by the husband, by himself or his tenants, and all her personal

(*a*) Corrie v. Cleaver, 21 U. C. C P. 186.
(*b*) 21 U. C. C. P. 368.
(*c*) Con. Stat. U. C. c. 73.

property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said Fourth day of May, one thousand eight hundred and fifty-nine, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law, usage or custom to the contrary notwithstanding. 22 V., c. 34, s. 2, (1859). SECTION 2.

Husband's interest at common law.

To understand the effect of the words "not then taken possession of by the husband, by himself or his tenants," it must be borne in mind that the husband, at common law, acquired by the marriage, and during the marriage enjoyed, a freehold interest in his wife's real estate of freehold for their joint lives, both being seized together in her right by entireties, the effect of which was to put the ownership for the coverture entirely in the husband's power. Hence he could alienate this ownership at pleasure, and his conveyance would pass the freehold without his wife's co-operation(*a*). It was not necessary to the creation of this interest in the husband that he should take possession, either by himself or his tenant. The intention of the 2nd section appears to be, to deprive the husband of this freehold interest in his wife's lands, unless he had taken possession before the date mentioned in the Act.

Emrick v. Sullivan. Effect of Act on husband's interest in wife's real estate.

But in *Emrick* v. *Sullivan* (*b*) Chief Justice Draper inferred from the wording of the 13th section, that the statute did not deprive the husband of the interest which he took in his wife's real estate at common law, by virtue of the marriage. "We apprehend," he observes, "the statute (13th section) must refer to the estate he (the husband) *has* as being jointly seized with his wife and in her right, during the coverture, of her real estate." The estate or interest mentioned in the 13th section cannot be an estate by the curtesy, for such an estate is not acquired by the husband by virtue of the marriage, but requires the birth of issue to create it and the death of the wife to perfect it.

Provisions of s. 2 as to personal property.

The provisions of section 2 as to personal property are capable of being consistently construed, inasmuch as the husband did not, at common law, acquire any interest in his wife's choses in action, except a right to make them his own by reducing them into possession.

Re Hilliker: meaning of the words "separate property" considered.

In *re Hilliker*(*c*), it was contended that the wife's real estate, of which the husband had been in possession before the 4th day of May, 1859, was not, by the 2nd section, made the wife's *separate property*, so as to enable her to devise it under the provisions of

(*a*) Macq. husb. and wife, 28: Robertson v. Norris, 11 Q. B. 916; Dingman v. Austin, 33 U. C. Q. B. at p. 192, per Richards, C. J.
(*b*) 25 U. C. Q. B. 107.
(*c*) 3 Ch. Cham. Rep. 73.

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the 16th section of the same Act; but the Court held that the words "separate property," used in the 16th section, meant no more than "her property," and that the wife could, under the 16th section, devise her real estate, although the husband had taken possession thereof before the 4th day of May, 1859.

This Act not to prevent seizure in execution in certain cases.

3. Nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts; and in such case, execution shall first be levied on her separate property. 22 V., c. 34, s. 3, (1859.)

Husband not relieved by the Act from liability for wife's torts.

The Act does not, in any respect, diminish the common law liability of the husband for the wife's torts. This section provides, however, that the wife's *separate property* shall be primarily liable to satisfy an execution against the husband for such torts. The words "her separate property," in this section do not mean "separate estate" in the sense in which that term is used or understood by the Courts of Equity, but mean no more than the words "her property," or the like, and include property of which the husband had obtained possession before the 4th day of May, 1859(*a*).

Not to affect tenancy by curtesy.

4. No conveyance or other act of a wife in respect of her real estate shall deprive her husband of any estate he may become entitled to as tenant by the curtesy *Ibid.* s. 4.

Provisions of section 4 inconsistent.

The provisions of section 4 are consistent in their inconsistency with the other provisions of this statute. Mr. Leith remarks that the wife could no more, by her sole conveyance, deprive her husband of curtesy, than the husband could, by his conveyance, deprive his wife of dower. From the provisions of sections 4 and 13, the inference may be drawn that the Act was not intended to deprive the husband of the rights which he acquired at law in his wife's real estate(*b*).

Order of protection required as to earnings.

5. No married woman shall be entitled to her earnings during coverture without an order of protection under the provisions hereinafter contained. *Ibid.* s. 5.

Protection orders now unnecessary.

An order under this Act is no longer necessary for the protection of a married woman's earnings during coverture, having been ex-

(*a*) Re Hilliker, 3 Ch. Cham. Rep. 72.
(*b*) Per Draper, C. J., in Emrick *v.* Sullivan, 25 U. C. Q. B., at p. 107.

pressly dispensed with by 35 Vict., c. 16, s. 2. It is not thought necessary, therefore, to consider with much minuteness those sections of this Act which relate to protection orders. SECTION 5.

In what cases a married woman may obtain an order of protection for her earnings.

6. Any married woman having a decree for alimony against her husband, or any married woman who lives apart from her husband, having been obliged to leave him for cruelty or other cause, which by law justifies her leaving him, and renders him liable for her support, or any married woman whose husband is a lunatic with or without lucid intervals, or any married woman whose husband is undergoing sentence of imprisonment in the Provincial Penitentiary, or in any gaol for a criminal offence, or any married woman whose husband from habitual drunkenness, profligacy or other cause, neglects or refuses to provide for her support, and that of his family, or any married woman whose husband has never been in this Province, or any married woman who is deserted or abandoned by her husband, may obtain an order of protection entitling her, notwithstanding her coverture, to have and enjoy all her earnings and those of her minor children, and any acquisitions therefrom, free from the debts and obligations of her husband, and from his control or dispositions, and without his consent, in as full and ample a manner, as if she continued sole and unmarried, any law, usage, or custom to the contrary notwithstanding. 22 V., c. 34, s. 6.

Purport and effect of such order

Provisions of English Divorce Act as to protection orders.

The protection afforded by the provisions of section 6, was less ample than the protection given to a woman deserted by her husband, by the English Divorce Act of 1857(*a*). Under that Act, the magistrate's order serves as a protection for the married woman's earnings *and property* acquired since the desertion, against the husband and his creditors(*b*); and the married woman so protected was clothed with the power of suing persons who interfered with the rights conferred upon her by the Act.

Earnings only are protected by this Act.

Section 6 entitled the married woman who was deserted, &c.,

(*a*) 20 & 21 Vict., c. 95.

(*b*) De Bathe *v.* The Bank of England, 4 Jur. N. S. 505; Re Kingsley, 4 Jur. N. S. 1010.

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only to the enjoyment of her earnings, and those of her minor children. It was probably considered, that the other provisions of the Act were a sufficient protection in respect of other property.

Causes justifying a wife in leaving her husband.

The causes which would justify a married woman in leaving her husband, and at the same time requiring him to support her, are causes which would justify the filing of a bill for alimony(*a*).

The cases in which the order of protection might have been issued are stated explicitly in the Act.

Wife may dispose of her protected earnings.

The protected earnings of a married woman and her minor children are made by the Act her separate property, of which she had an absolute power of disposing by will(*b*).

The remarks of Adam Wilson, J. in *Wright* v. *Garden*(*c*), as to the effect of a protection order, cannot be received as a statement of the law of this Province, inasmuch as the English Act, 20 & 21 Vict., differs in many important particulars from our own Act respecting orders of protection.

How and by whom an order discharging protection may be obtained.

7. The unmarried(*d*) woman may at any time apply, or the husband, or any of the husband's creditors may, at any time, on notice to the married woman, apply for the discharge of the order of protection; and if an order for such discharge be made, the same may be registered or filed like the original order. 22 V., c. 34, s 7 (1859).

Either order may be in duplicate. By whom to be made in cities and towns. Registration.

8. Either order may issue in duplicate, and when the married woman resides in a City or Town where there is a Recorder or Police Magistrate, the order for protection, or any order discharging the same, shall be made by the Recorder or Police Magistrate, and shall be registered in the Registry Office of the County. *Ibid.* s. 8.

9. When the married woman does not reside in a City or Town where there is a Recorder or Police Magistrate, the order shall be made by the Judge or one of the Judges, or the acting or Deputy Judge of the Division Courts, or a Division Court of the County in which the married woman resides, and instead of being registered, shall be

(*a*) See the cases collected in Taylor's Chy. Orders, at pp. 12, et seq.
(*b*) See the cases referred to in Walkem on Wills, p. 39.
(*c*) 28 U. C. Q. B., at p. 620.
(*d*) The word "unmarried" in the Act, is evidently a misprint for the word "married."

filed for public inspection with the Clerk of the Division Court of the division within which the married woman resides. 22 V., c. 34, s. 9 (1859). SECTION 9. By whom made when not in such city or town.

10. The hearing of an application for an order of protection, or for an order discharging the same, may be public or private, at the discretion of the Judge, Recorder, or Police Magistrate. *Ibid.* s. 10. Hearing may be public or private.

11. The order of protection shall have no effect until it is registered or filed, and the Registrar or Clerk shall immediately on receiving the order, endorse thereon the day of registering or filing the same; and a certificate of the registering or filing and date, signed by the Registrar or Clerk for the time being, shall be *prima facie* evidence of such registering or filing and date; and a copy of the order which is registered or filed, certified under the hand of the Registrar or Clerk to be a true copy thereof, shall be sufficient *prima facie* evidence of the order without proof of the signature of the Registrar or Clerk, and without further proof of the order itself, or of the making or validity thereof. *Ibid.* s. 11. Order not to have effect until registered. Evidence of order, &c.

12. The order for discharging an order of protection shall not in any case be retroactive, but shall take effect from the time it is made, and the order for protection shall protect the earnings of the married woman and her children until an order be made discharging such order of protection, and the married woman shall continue to hold and enjoy to her separate use whatever, during the interval between the registering or filing of the order of protection and the making of the order discharging the same, she may have acquired by the earnings of herself and her minor children. *Ibid.* s. 12. From what time the order discharging protection shall take effect.

SECTION 13.

Estate to which a husband is entitled in the property of his wife, not subject to his debts during her life.

13. Any estate or interest to which a husband may, by virtue of his marriage, be entitled in the real property of his wife, whether acquired before or after the Fourth day of May, one thousand eight hundred and fifty-nine, or after this Act takes effect, shall not during her life be subject to the debts of the husband, but this provision shall not affect the right which any person, by or under any judgment or execution obtained against the husband, had obtained in respect of any such estate or interest acquired by a husband before the said Fourth day of May, one thousand eight hundred and fifty-nine. 22 V., c. 34, s. 13 (1859).

Obscurity of provisions of this section.

The meaning of the provisions of the thirteenth section is by no means clear. The remarks of Chief Justice Draper in *Emrick* v. *Sullivan*(*a*), respecting those provisions and the deduction to be drawn from them, have already been referred to (*b*). The learned Chief Justice is of opinion that the estate or interest referred to and protected by this section, cannot be an estate by the curtesy, for that estate could not, during the wife's life, be made subject to the debts of the husband(*c*), and he concludes that the statute must refer to the estate the husband has, as being jointly seized with his wife, and in her right, during the coverture, of her real estate.

Act refers to husband's interest during coverture in wife's real estate.

This interest is a bare estate.

But this estate must necessarily be a bare estate, inasmuch as the wife is entitled under sections one, two, and nineteen, to the use and profits of her real estate during her life, with the exception of such real estate as was taken possession of by the husband before the fourth day of May, 1859. To such estate the thirteenth section probably applies(*d*).

Separate property of wife to be liable for her debts before marriage.

14. Every married woman having separate property, whether real or personal, not settled by any ante-nuptial contract, shall be liable upon any separate contract made or debt incurred by her before marriage, such marriage being since the said Fourth day of May, one thousand eight hundred and fifty-nine, or after this Act takes

(*a*) 25 U. C. Q. B. at p. 107.
(*b*) Ante p. 16.
(*c*) The husband's estate by the curtesy initiate after birth of issue was, it appears, saleable at common law. Per McLean, J., in Moffatt *v.* Grover, 4 U. C. C. P., at p. 402.
(*d*) The reader may consult with great advantage the remarks of Mr. Leith on this section—Leith's R. P. Stat. 277–285.

effect, to the extent and value of such separate property, in the same manner as if she were sole and unmarried. 22 V., c. 34, s. 14 (1859). SECTION 14.

Difference between original and consolidated Act.

In consolidating the statutes, the word "hereafter," contained in the original Act between the words "contract" and "made," was omitted. This omission is productive of important results. The Act, as it originally stood, no doubt authorized a married woman so to contract during coverture, as to make her property under the Act responsible for the fulfilment of her engagements(*a*). As it is, she has no greater power to contract than she possessed before the Act was passed(*b*). The object of this section, as it now stands, taken in connection with s. 18, seems to be, to make the property of the wife liable for debts contracted by her before marriage, and to relieve the husband from the common law liability which he would incur by the marriage to pay his wife's debts(*c*).

Liability of husband for such debts, limited.

15. Every husband who since the said Fourth day of May or hereafter takes any interest in the separate, real or personal property of his wife, under any contract or settlement on marriage, shall be liable upon the contracts made or debts incurred by her before marriage, to the extent or value of such interest only, and no more. *Ibid.* s. 15.

Effect of section 15 as to wife's debts contracted before marriage.

This section makes the husband liable for the wife's debts contracted before marriage, to the extent or value only of the interest he may take in her separate property under a contract or settlement of marriage(*d*). Practically the husband is relieved from the payment of the wife's debts incurred by her dum sola(*e*).

Construction of s. 15.

If this section were construed according to its grammatical meaning, it might be doubtful whether a husband who takes no interest in his wife's property under a marriage contract or settlement is not responsible for her debts incurred before marriage. The section reads: "Every husband who takes *any interest*, &c., shall be liable, &c." A husband who does not take any such interest would not appear to have any protection—a result which would be absurd. The 18th section provides, however, that in any action or proceeding at law or in equity by or against a married woman, the husband, if residing within the Province, shall be made a party, and if absent therefrom, the action or proceeding may go on for or against her alone; and it shall be alleged in the declaration, &c., that such

Effect of s. 18.

(*a*) Per Richards C. J. in Wright *v.* Garden, 28 U. C. Q. B. at p. 611.
(*b*) See Kraemer *v.* Gless, 10 U. C. C. P. 470; Royal Canadian Bank *v.* Mitchell, 14 Grant. 412.
(*c*) Per Richards, C.J., in Wright *v.* Garden, sup. at p. 612.
(*d*) Per Richards, C.J., in Wright *v.* Garden, sup. at p. 612.
(*e*) Per Draper, C. J., in Kraemer *v.* Gless, 10 U. C. C. P. at p. 474.

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cause of action occurred before marriage, and also that such married woman *has separate estate;* and the judgment or decree therein, *if against* such married woman, shall be *to recover of her separate estate only*, &c. The words "if against" are very ambiguous. They probably mean, if the action succeeds against her *as a defendant*(*a*).

Married woman may devise or bequeath her separate property, &c.

16. From and after the said Fourth day of May, one thousand eight hundred and fifty-nine, and hereafter, every married woman may, by devise or bequest executed in the presence of two or more witnesses, neither of whom is her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; but her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the curtesy. 22 V., c. 34, s. 16, (1859).

Meaning and effect of word "every."

The word "every" in this section would include a minor. As a female of twelve years of age could in this Province, before the 1st January, 1874, make a will of personalty, if possessed of sufficient discretion(*b*), there seems to be no room for doubt that a married woman, though a minor, if over twelve years of age, and if possessed of sufficient discretion, could make a valid will of her personalty under the provisions of this section. As to real estate, however, the case is different. Infants were expressly excepted in the statute 34 & 35 H. 8, c. 5; and, since the passing of that Act, an infant never possessed the power of disposing of his real estate by will. It is conceived that this Act does not confer on an infant the power to will her real estate; but that the Act was intended merely to remove, to a certain extent, the disability of coverture(*c*).

Power of minors to devise or bequeath.

Execution of a will of personalty.

A will of personalty, when this Act was passed, did not usually require either signature or attestation(*d*). A will of real estate was required by the Statute of Frauds to be signed by the testator and attested in his presence by three credible witnesses. By. 4, W. 4, c. 1, s. 51(*e*), it was provided that any will affecting land, executed

Execution of devises.

(*a*) See the notes to section 18, and see also the observations of Adam Wilson, J., in Wright *v.* Garden (sup.)
(*b*) See Walkem on Wills, at p. 22.
(*c*) See Leith R. P., Stat. 283.
(*d*) Walkem on Wills, p. 224.
(*e*) Con. Stat. U. C. c. 82, s. 13.

after the sixth day of March, one thousand eight hundred and thirty-four, in the presence of, and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of, and attested by three witnesses, and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator. SECTION 16

Section sixteen implies that the will must be *in writing*. It is conceived also that the devise must be duly executed and attested in accordance with the existing law. The words, "in the same manner as if she were sole and unmarried," in the latter part of the section would seem to imply this (*a*). Will under s. 16 must be in writing and duly executed.

The words, "separate property," used in the sixteenth section, comprehend not only the married woman's property "settled" by the first and second sections, which is, to a limited extent, made *separate* property by the Act, but also real estate belonging to the wife, of which the husband had taken possession before the fourth day of May, 1859. In *re Hilliker*(*b*) it appeared that a wife, who was married before the fourth day of May, 1859, and who died without issue, devised to her husband her real estate, of which he had taken possession before that date. It was contended that the property devised was not "separate property" under the Act(*c*), and that the sixteenth section, which gives the power of devising "separate estate." did not authorize the devise in question. The Court, however, held otherwise. V.-C. Mowat remarked, "It was suggested that the sixteenth section might be construed as confined to property given, independently of the Act, to the separate use of a married woman. But, looking at the whole scope of the Act, and remarking that, without the Act, a woman had larger powers of devising separate property which came to her as owner by deed or devise than the Act gives (*d*), I am clear that the sixteenth section cannot be construed as referring to separate property of that kind. It seems quite true that the second or any other section of the Act did not make this sort of interest, "separate estate," in the sense in which Courts of Equity have been in the habit of using that expression, inasmuch as the Act did not give a wife, married on or before the 4th May, 1859, any control over property then taken possession of by her husband by himself or his tenants; but did the Legislature use the expression in its strictly technical sense? A design to exclude from the devising power property in that position would be curious; and no possible object for it, consistent with the purpose of the Act, was suggested. The third section provides that executions for a wife's torts "shall first be levied on her separate property;" and the eighteenth section provides that claims in respect of contracts made or debts incurred by her before her marriage shall be recovered out "of her separate estate only." It is not to be supposed that the expression "separate property, and separate estate" in these clauses Meaning of words "separate property." Re Hilliker. Wife's property not made separate estate by 2nd Section. Provisions of 3rd Section.

(*a*) See Leith's R. P. Stat. 282, and the remarks on this subject in Walkem on Wills, at. p. 208.
(*b*) 3 Ch. Cham. Rep., 72.
(*c*) See Section 2.
(*d*) Taylor *v.* Meade, 11 Jur. N. S. 167.

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were not intended to include property of which the husband had got possession at the date named. On the contrary, I am of opinion that in these two clauses, and in the sixteenth also, the Legislature did not use the expression in the strict technical sense of a Court of Equity, and meant by it no more than if the expression had been "her property," or the like(*a*).

Mitchell *v.* Weir: opinion of V.-C. strong as to construction of 16th section.

The powers conferred on a married woman by s. 16 are discussed by V.-C. Strong in the late case of *Mitchell* v. *Weir*(*b*). In that case a married woman, being entitled to a large amount of personal property under the will of her father, assumed to devise all her estate, real and personal, to her husband (the plaintiff), who alone proved the will, and certain other trustees and executors, who renounced) upon trust to convert the same, and, out of the proceeds, to pay a legacy of $10,000 to her child, the infant defendant, $10,000 to her husband, and other sums to various legatees ; the residue to be divided amongst the testatrix's brothers and sisters. The question raised was whether this will was not *ultra vires* of the married woman, and the Court held that it was. V.-C. Strong remarked : "It has been argued before me, on behalf of the infant defendant, that this will, so far as it gives legacies to persons other than the infant daughter of the testatrix, is void, inasmuch as the testatrix had no power to bequeath personalty otherwise than in the manner prescribed by section 16 of Con. Stat. U. C., c. 73, which authorizes a married woman to make a will, leaving her property to her child or children, and in default of issue to her husband, or as she may see fit, as if she was sole and unmarried. I think the construction of this clause leaves no room for doubt that the right to devise or bequeath to the husband, or otherwise, only arose in default of issue ; 'failing such issue,' as the words are. Any other construction would completely silence these words just quoted. This being so, it could not be contended that separate property under this Act, in the face of the direct enactment contained in the clause referred to, could, as at common law, be at the free disposal of a married woman by a will executed with the assent of her husband ; and, although the contrary was very properly and ably argued by Mr Lash for the residuary legatees, I think it equally clear that a married woman, in respect of separate property under this Act, has no authority to deal with her personalty by will, as she may with personalty so settled as to be her separate estate in equity. The property of the wife, under this Act, is altogether the creature of the statute, and the married woman's power of disposition in respect of this Parliamentary property must be ascertained from the statute itself, and the common law can in no way apply, except where the statute is silent. Further, there is no analogy between the power of disposition of a woman, under this statute, and a married woman having separate estate in Equity, with no fetter on her power of alienation ; for here, as I construe section 16, there is an express restriction of the power of bequeathing, and if a like limitation were contained in a declaration of trust to the separate use of a

(*a*) As to the construction to be placed on these words, see the Royal Canadian Bank *v.* Mitchell, 14 Grant 412, and the other cases cited in the notes to the 1st section.

(*b*) 19 Grant, 568.

feme covert, it would have a like effect. I find no cases decided bearing on this point, which I confess, although a case of first impression, seems to me so clear as to require no authority. The cases on the other clauses of the Act have not much bearing on this question. The principle to be followed in construing the statute is, however, very clearly put by high authority in the case of *Kraemer* v. *Gless*(a), where Draper, C. J., says: 'Every provision for these purposes is a departure from the common law; and, so far as it is necessary to give these provisions full effect, we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give.' I am of opinion, therefore, that the will, in so far as it dealt with the residue left, after deducting the $10,000 bequeathed to the infant defendant, is absolutely void, and that this residue, therefore, falls to be distributed under the provisions of section 17, which provides that it shall be divided between the husband and child, in the proportion of one-third to the husband and two-thirds to the child."

SECTION 16. Absence of authority.

The words "failing there being any issue" in section 16 must evidently be read in connection with the words "child or children issue of any marriage," which immediately precede them. If, therefore, there are no children living at the death of the wife, it would seem that she may devise as she pleases, even though there should be grandchildren living at that time(b).

Words "failing there being any issue."

The concluding words of this section, saving the husband's rights, can relate only to a devise by the wife of real estate, there being no such estate as a tenancy by the curtesy in personal property. The 4th section, and the concluding words of the 16th section, have both for their object the preservation of the husband's estate as tenant by the curtesy, and both seem to be equally unnecessary. Mr. Leith pointedly remarks with reference to the concluding words of the 16th section, that the wife could no more, by devise, deprive the husband of his estate by the curtesy than he, by his devise, could deprive her of her dower(c).

Tenancy by the curtesy.

17. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is to be distributed between his wife and children; and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not been passed. 22 V., c. 34, s. 18, (1859).

Separate personal property of wife dying intestate, how to be distributed.

(a) 10 U. C. C. P. 475.
(b) See Leith's R. P. Stat. 283, 284.
(c) Leith's R. P. Stat. 284.

SECTION 17.

Effect of s. 17.

This section is a direct inroad upon the common-law rights of the husband. The Act preserves to a married woman, during coverture, the use and enjoyment of her property, thus abolishing the marital right of the husband during the coverture (*a*). But for the provisions of this section, the husband would, on the death of the wife, whether she left issue or not, still have been entitled to her personalty in possession in his marital right(*b*), the separate use becoming extinct by the death of the wife, and to her choses in action as her administrator.

Husband's right at law by survivorship.

Mode of distribution between husband and children.

The interest which a husband would take under this section if the wife left children, would be one-third, the children taking two-thirds(*c*). If the wife leaves no children living at her death, the husband becomes entitled, as above stated, for his own use(*d*).

Meaning of word "children."

Mr. Leith, in his work on the Real Property Statutes, states his opinion to be(*e*), that the word "children" in this and the preceding section would be construed strictly, and would be held not to include "grandchildren." If this be the true construction, the Act must be considered in this respect to be sadly defective.

Right of wife to make will with consent of husband abolished.

It is conceived that this section has the effect of abolishing the common-law right of a married woman to make a will of her personalty with the assent of her husband, at all events, when she leaves children, inasmuch as the husband is deprived of that absolute right of property in his wife's personalty, which the law formerly gave him on his wife's decease, and on which was founded the power of waivor, which *gave effect* to the will of a wife(*f*).

As to actions &c., against wife for debts contracted before marriage.

18. In any action or proceeding at law or in equity, by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband shall be made a party if residing within the Province, but if absent therefrom, the action or proceeding may go on for or against her alone; and in the declaration, bill or statement of the cause of action, it shall be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate; and

Judgment or decree in such cases.

the judgment or decree therein, if against such married woman, shall be to recover of her separate estate only, unless in any action or proceeding against her, in which her husband has been joined as a party, any false plea or answer has been pleaded or put in by him, when the

(*a*) Sup. p. 1.
(*b*) Molony *v.* Kennedy, 10 Sim. 254; Bird *v.* Peagrum, 13 C. B. 639.
(*c*) See Mitchell *v.* Weir, 19 Grant, 563.
(*d*) Leith's R. P. Stat. 285. See also, 2 Wm. Exors., 1376, et seq.
(*e*) At p. 284.
(*f*) Walkem on Wills, p. 34, note.

judgment or decree shall be, in addition, to recover against him the costs occasioned by such false plea or answer, as in ordinary cases. 22 V., c. 34, s. 19, (1859). SECTION 18.

Husband must be joined as a defendant with wife.

Necessary allegations in declaration.

The Act makes it necessary that the husband should be joined as a defendant with his wife in an action grounded on a contract made by her before her marriage, and also that the declaration should contain an averment that she had separate estate(*a*). The necessity for this later allegation, coupled with other provisions of the Act, seems to involve the consequence that if a woman, while sole and unmarried, makes a contract, or incurs a debt, having no real or personal estate, and afterwards marries, no action can be maintained against her while covert, because it must be averred in the declaration that she has separate estate; nor will her husband be liable on the contracts made, or debts incurred by her before marriage, except to the extent of any interest he has taken in her separate real or personal estate(*b*).

Kirchoffer v. Ross.

In *Kirchoffer* v. *Ross*, (*c*) the action was brought against the female defendant and her husband, upon a bond given by her, *dum sola*, conditioned for the due fulfilment of her duties as administratrix of the estate of one Macaulay. There was no averment that the wife had any separate property. Chief-Justice Draper observed: "The present case falls within the 18th section, if the wife had any separate estate, and, if not, I do not at present perceive what remedy there is against her. According to the evidence, it is probable she had, at the time of her marriage, some of the property of her deceased husband. Possibly she may still have some, or her now husband may have reduced it into possession, or made use of it so as to be liable within the 14th section in a joint action for the debt incurred by the wife. But, however that may be, I see no escape for the plaintiff from the necessity of making the two averments required by this 18th section; and though what is stated leads almost inevitably to the inference that the cause of action accrued before the defendant Letitia was married to her present husband; yet it cannot be said that it is formally alleged, and at all events there is no allegation that the defendant Letitia 'has' separate estate, whatever time the word 'has' points to."

Wife cannot sue alone to recover real estate.

The act does not authorize a married woman to sue alone to recover possession of real estate acquired by her before the coverture; her husband must be joined with her as a co-plaintiff(*d*). No provision, it will be observed, is made in the Act for an action or proceeding against a married woman on any contract made, or debt incurred, by her *after marriage*. The absence of such a provision is used by Chief Justice Richards as an argument in favour of the view that no such liability could arise under the Act(*e*).

No remedy against wife on her contract after marriage.

"Separate property"—meaning of.

In *re Hilliker*(*f*), it was held that the words "her separate estate,"

(*a*) Muldoon *v.* Belton, 10 U. C. C. P. 382; Kirchhoffer *v.* Ross, 11 U. C. C. P. 467.
(*b*) Per Draper, C. J. in Kirchhoffer *v.* Ross, sup. at p. 471.
(*c*) Sup.
(*d*) Scouler *v.* Scouler, 19 U. C. Q. B. 106.
(*e*) See Wright *v.* Garden, 28 U. C. Q. B., at p. 612.
(*f*) 3 Ch. Cham. Rep. 72.

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in the 18th section, mean no more than the words "her property," or the like.

Application of s. 18.

Section 18 applies to those cases only in which judgment has not been obtained against the wife before her marriage(*a*) (*b*).

Act not to affect marriage settlements, &c.

19. Nothing in this Act contained shall be construed to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but notwithstanding any such contract or settlement, any separate, real or personal property of a married woman, acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement. 22 V., c. 34, s. 20, (1859).

As to property not coming within the contract.

20. This Act shall apply and be construed retrospectively to the fourth May, one thousand eight hundred and fifty-nine, as well as prospectively, so as to give full operation and effect thereto, as from the time of the passing of the 22 V., c. 34, (1859).

(*a*) Aylesworth *v.* Patterson, 21 U. C. Q. B. 269.
(*b*) As to what is a settlement, see notes to Section 1, pp. 20, 21.

AN ACT

TO EXTEND

THE RIGHTS OF PROPERTY

OF

MARRIED WOMEN.

XXXV VICT., (ONT.) CAP. XVI.

(*Assented to 2nd March*, 1872.)

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and therents, issues and profits thereof respectively, shall, without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a feme sole.

Tenancy by the curtesy abolished in certain cases.

Effect of first section.

The first section operates as a settlement to the separate use of the wife of all the unsettled real estate which is owned by her at the time of her marriage, or is acquired by her in any manner during the coverture. The Act is not intended to supersede marriage settlements, respecting which the remarks of the Court, in the cases decided under Con. Stat. U. C., c. 73, will no doubt still be applicable(*a*).

Does not supersede settlements.

(*a*) See notes to sec. 1 of Con. Stat. U. C., c. 73, pp. 20, 21.

SECTION 1.

Section 1 is not retrospective.

Section 1 has been decided(*a*) not to be retrospective in its operation; and it will therefore apply only to real estate owned by a woman who marries after the passing of the Act, or to real estate acquired after the passing of the Act by a woman who was married before that time. The word "is" would imply this. Chief-Justice Richards, in *Dingman* v. *Austin*(*b*), remarks(*c*), "The fair reading of the section seems to me to apply to marriages which take place *after* the passing of the Act; for it does not say the real estate of the married woman which *was* or *may be* owned by her at the time of her marriage, or acquired in any manner during coverture, shall be held by her, but only *is* owned; that is, speaking of something that is to take place *after* the passing of the Act. I take it to be a well established rule, that no strained construction will be put on an Act of Parliament to deprive a man of his estate. This section of the Act can have its full force, and all the clauses of the statute be fully operative, by limiting this first section . . . . . to marriages that take place after the passing of the statute. I think this is the natural, reasonable, and just view to take of the section from its very words.

Dingman *v.* Austin.

Remarks on Merrick *v.* Sherwood.

"I have seen the elaborate judgment of Mr. Justice Gwynne, in the case in the County Court of the County of York, tried before me, which came before the Common Pleas. It may be inferred that the majority of the Judges of that Court entertain a different view as to the effect of the first section of the statute from that which I have expressed. It is not necessary, as I understand the case of *Merrick* v. *Sherwood*(*d*), to sustain the verdict in that case, that the Court should be of opinion that the first section of the statute was not confined to marriages which might take place after the passage of the Act. Chief-Justice Hagarty dissented from that judgment on the points necessary to be decided for sustaining the plaintiff's action, and I infer that he entertained the view above expressed, as to the first section of the statute being limited to marriages which might take place after the passing of the Act."

Real Estate acquired by wife before passing of Act.

Real estate acquired by a married woman before the passing of the Act will, therefore, still be subject to the pre-existing law. With respect to such part of that real estate as was affected by the provisions of Con. Stat. U. C., c. 73, that Act will, it is conceived, continue in force.

Effect of Act on wife's real estate.

The wife's real estate being, by the Act, fully settled to her separate use, she aquires in respect of it those rights and privileges which are attached to such estate by Courts of Equity, chief amongst which is the right to dispose of her equitable interest, to the extent of a fee simple, by deed unacknowledged, or by will(*e*), such disposition carrying with it the right to call in the legal estate(*f*).

Effect of 36 Vict., c. 18.

The value of this power of disposition is not diminished by the

(*a*) Dingman *v.* Austin, 33 U. C., Q. B. 190.
(*b*) *Ubi sup.*
(*c*) At p. 193.
(*d*) 22 U. C. C. P. 467.
(*e*) Taylor *v.* Meade, 11 Jur., N. S. 166; 34 L. J., Ch. 203; 13 W. R. 334; Hall *v.* Waterhouse, 11 Jur., N. S. 361; 13 W. R. 633: Pride *v.* Bubb, L. R. 7, Ch. Ap. 84.
(*f*) Hall *v.* Waterhouse (*sup*)

provisions of "The Married Woman's Real Estate Act, 1873" (*a*); for though that statute dispenses with the ceremony of acknowledgment for the conveyance by a married woman of the legal estate, it does not dispense with the concurrence of the husband, who must, except in the cases provided for by the fourth section of that Act, still be a party to the deed. SECTION 1.

The power of devising the equitable fee will, it is conceived, be practically merged in the more extensive power of devising created by the provisions of "The Wills Act, 1873," which confers upon a married woman a general power of testamentary disposition(*b*). Wife's power of devising

The privileges conferred upon wives by this Act, with respect to their unsettled real estate, are :— Privileges conferred on wives.

1. The abolition of the husband's joint ownership during the coverture, which, it was thought, was not abolished by Con. Stat. U. C., c. 73(*c*). Husband's joint-interest abolished.
2. The abolition, at least during the coverture, of the husband's estate by the curtesy, which was expressly preserved by the former Act(*d*). Husband's curtesy limited.
3. The right to the enjoyment of the rents, issues, and profits of their real estate. Rents and profits.
4. The same right of disposing of or charging their real estate as is conceded by Courts of Equity to married women holding separate estate, the creature of those Courts. Wife's power of disposition.

The estate of the husband by the curtesy demands particular consideration. As the separate use exists only during the lifetime of the wife (*e*), it is not necessary for her protection that this estate should be *altogether* abolished. Nor is it *expressly* abolished; for the Act provides merely that "a married woman may hold and enjoy her real estate for her separate use *free* from any estate or claim of her husband . . . as tenant by the curtesy;" that is, the husband's estate by the curtesy shall not be allowed to interfere with or fetter the wife's absolute enjoyment of her real estate. If it had been intended by the Act to abolish the estate by the curtesy, the intention would, it is conceived, have been declared directly, and not inferentially. A few plain words would have put the matter beyond doubt. Remarks on effect of Act on husband's estate by the curtesy. Curtesy not expressly abolished.

The object of this Act would not, it is thought, be interfered with, if the estate by the curtesy should be held to exist after the wife's death, subject to any disposition made by the wife, or to any direct or indirect charges created by her. During the wife's lifetime she enjoys, by virtue of the Act, an absolute right of alienation; and, by will, she can dispose of her interest as she pleases. When the coverture ceases by the death of the wife, her real estate is divested of the peculiar separate character which attached to it during her lifetime(*f*). Curtesy might still exist. Wife's rights of disposition.

Chief-Justice Draper, in *Kraemer* v. *Gless*(*g*), gave expression to a well understood rule of construction when he remarked, speaking Kraemer v. Gless Opinion of Draper, C.J.

(*a*) Stat. Ont., 36 Vict., c. 18.
(*b*) Walkem on Wills, at p. 47.
(*c*) See notes on pp. 16, 23, 24.
(*d*) Sections 4 and 16.
(*e*) Molony *v.* Kennedy, 10 Sim. 254.
(*f*) Molony *v.* Kennedy (*sup*).
(*g*) 10 U. C. C. P. 470.

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of Con. Stat. U. C., c. 73, that it is against principle and authority to infringe (on the common law) any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give; and it is submitted that an estate by the curtesy in his wife's separate real property, under the Act now under consideration, can be conceded to a husband without infringing upon the objects of the Act.

Husband's curtesy in wife's separate estate.

In considering this question, we are naturally led to the enquiry how the Courts of Equity deal with the estate by the curtesy in connection with separate estate, their own creature. It has been held that if the married woman did not avail herself of her right to dispose *inter vivos* or by will of personalty settled to her separate use, the husband became entitled to it on her death, as at common law, by virtue of his marital right(*a*). Applying the principle involved in this doctrine to the wife's separate estate, it should seem—assuming, of course, that the other conditions necessary to such an estate are fulfilled—that the husband should be entitled to an estate by the curtesy in the wife's separate real estate undisposed of. Accordingly, it is laid down by Macqueen(*b*), that, as regards the wife's separate real estate, the husband will, on the birth of issue capable of inheriting it, if otherwise entitled, be tenant by the curtesy. In a recent case(*c*), V.-C. Malins arrived at the same conclusion, expressing his dissent from the opinion of V.-C. Stuart, in *Moore* v. *Webster*(*d*). The authorities are reviewed by V.-C. Malins in an elaborate judgment, which deserves careful attention.

Appleton *v.* Rowley.

Application to the Act of rules of Equity.

The reasoning of the learned Vice-Chancellor, in *Appleton* v. *Rowley*(*e*), applies with much force to the statute now under consideration. The statute says that a married woman may hold and enjoy her real estate for her separate use, *free* from any estate of her husband as tenant by the curtesy. There is no inconsistency in this provision and the right of curtesy after the wife's death, subject to any direct or indirect disposition the wife may have made, subsisting together. To hold otherwise, it is submitted, would be to infringe on the pre-existing law further than is necessary to carry out the objects of the Act.

Opinion of Gwynne, J., in Merrick *v.* Sherwood.

These suggestions are offered with much hesitation, as they seem to be opposed to the opinion of the learned Judge(*f*) who decided the case of *Merrick* v. *Sherwood*(*g*). Referring to the first section of the Act, he observes(*h*), "The operation of this section, as it seems to me, is to divest the husband of *all* estate and interest in the real estate of his wife, otherwise than under the trusts of a settlement affecting the same, thereby leaving the absolute estate vested in the wife, subject to absolute liability at law and in equity, in respect of any contract made by her touching her real estate, just as if she were a *feme sole*, and *thereby* annexing absolute liability to absolute enjoyment."

Observations on this opinion.

Respecting this opinion, it may be observed, that the curtesy

(*a*) Molony *v.* Kennedy, 10 Sim. 254; Macq. husb. and wife, 319.
(*b*) Macq. husb. and wife, 320.
(*c*) Appleton *v.* Rowley, L. R. 8 Eq. 139.
(*d*) L. R. 3, Eq. 267.
(*e*) *Sup.*
(*f*) Mr. Justice Gwynne.
(*g*) 22 U. C. C. P. 467.
(*h*) At p. 477.

conceded to the husband in the separate estate of his wife, existed only subject to any disposition of such estate which the wife might have made, either by contract or otherwise; and therefore this estate, as conceded by the Courts of Equity, never in the slightest degree interfered with the wife's absolute power of disposition, or with the rights of creditors against the separate estate in respect of the wife's contracts with reference to that estate. Every contract so made was a charge upon the separate estate, in the residue only of which, after satisfaction of the creditors' claims, the husband could claim curtesy. SECTION 2.

Curtesy did not in Equity interfere with creditors' claims.

The language used in the judgment above referred to would lead to the inference that the learned Judge considered that the estate by the curtesy, before the passing of the Act, stood in the way of creditors' claims; for the liability to such claims is stated to be a consequence of the husband being divested of *all* estate and interest. This, however, was apparently not the case, the tendency of the recent decisions being in favour of making a married woman's liability for her debts and engagements co-extensive with her power of disposition over her separate property(*a*). As this power of disposition could be exercised so as to defeat the husband's estate by the curtesy, it would follow that the right to that estate would be subject to the right of creditors to obtain payment of their claims out of the married woman's separate real estate after her death. The husband might still, however, have an estate by the curtesy in the residue.

Wife's liability on her contracts.

The concluding words of the first section, "Any married woman shall be liable on any contract made by her respecting her real estate as if she were a feme sole," would appear to be the only words in the Act which *directly* create a liability *at law* on the part of a married woman in respect of her contracts after marriage.

Provision of 9th section.

But the 9th section of the Act, which relates to the mode of procedure, provides that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried;" and the effect of this section seems to be to create a responsibility on the part of the married woman *at law* in respect of her separate debts, &c. In *Merrick* v. *Sherwood*(*b*), a married woman was held liable *at law* in respect of a debt incurred by her upon the credit of her separate estate. It was argued in that case that a married woman was only authorized by the Act to contract, so as to be responsible *at law*, in respect of her *real* estate; but the Court held otherwise. It is difficult to understand why, if a general power to contract, cognizable at law, was intended to be created, the particular power to contract in respect of real estate, should have been created by the first section.

Effect of those provisions.

Wife's liability at law.

2. All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries

Personal earnings of married women protected.

(*a*) Picard *v.* Hine, L. R. 5 Ch. Ap. 274; McHenry *v.* Davies, L. R. 10 Eq. 88; 18 W. R, 855.
(*b*) 22 U. C. C. P. 467.

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on separately from her husband or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys or property shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a feme sole; and no order for protection shall hereafter become necessary in respect of any of such earnings or acquisitions; and the possession, whether actual or constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts.

Effect of section 2.

The second section operates as a settlement to the married woman's separate use of the following classes of property :—

Wages and earnings.

1. All the wages and personal earnings of a married woman, and any acquisitions therefrom.

Profits from trade.

2. All proceeds and profits from any occupation or trade which a married woman carries on separately from her husband.

Profits from literary labours, &c.

3. All proceeds or profits derived by a married woman from any literary, artistic, or scientific skill.

Investments.

4. All investments of such wages, earnings, moneys, or property.

Wife's general personal estate not subject to the Act.

These, with the real estate mentioned in the first section, are the only classes of property which are protected by this Act. If we compare this list with that contained in the English Statute, 33 & 34 Vict., c. 93, we find that though by section 7 of the English Act any personal property to which a married woman becomes entitled as next of kin of an intestate, or any sum of money not exceeding £200 to which she becomes entitled under any deed or will, is made by that Act her separate property, yet no similar provision is made in our Act with respect to a woman's personal property other than such as is mentioned in the second section. Such personal property is, therefore, left in the same position as before the Act was passed(*a*).

Remarking upon the meaning and effect of the words, "and the possession, whether actual or constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts," in the latter part of the second section, Mr. Justice Gwynne, in a late case(*b*), observes, "Now, if she already had or was intended to have an absolute *jus disponendi* over all her personal chattels as a *feme sole*, these latter words would have been wholly unnecessary. Their insertion seems to point to a recognition by the Legislature that the husband might rightfully have the possession of certain personal chattels, the property of the wife, which

(*a*) McGuire *v.* McGuire, 23 U. C. C. P., 123.
(*b*) McGuire *v.* McGuire, sup. at p. 132.

it was desirable to declare should not, notwithstanding his having a right to the possession thereof, be liable, by reason thereof, for his debts." And he further observes(*a*), "The Act 35 Vict., c. 16, gives no greater interest to the wife in personal chattels of the description of those for which this action is brought, such as household furniture, &c., brought by the wife into the marriage, than chapter 73 of the Consolidated Statutes had done. The 9th section of 35 Vict. only gives separate *remedies* to the wife for the *recovery*, *protection*, and *security* of any wages, earnings, money, and property, by that or any other Act *declared to be her separate property*, and of any chattels or other her *separate property for her own use*.

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Her right, interest, and property in household furniture, and such like chattels as are the subject of this suit, brought by her into the marriage, are the same as before the passing of 35 Vict., ch. 16; and that right, interest, and property, upon the principle of the decided cases, we must hold to be governed by the terms of the statutory marriage settlement relating to them(*b*)."

Wife's earnings formerly husband's property.

Before this Act, the wages and personal earnings of a married woman, unless protected by an order of protection, were the property of her husband(*c*); but she is now, by section 9, enabled to sue for them in her own name(*d*).

Gains from unlawful trade not protected.

The Act does not, it is conceived, extend to earnings or profits derived from an unlawful occupation, such as the keeping of a brothel(*e*).

Lett v. The Commercial Bank.

The remarks of the Court in *Lett* v. *The Commercial Bank*(*f*), with regard to a wife's property used by the husband with her permission will, no doubt, be applicable to property held as separate estate under this section; and such property, if allowed to be used and dealt with by the husband under circumstances similar to those in that case, may, therefore, become liable to satisfy the claims of the husband's creditors, notwithstanding the provisions of the Act. It is to be observed, however, that the concluding words of section 2 are framed peculiarly with a view to the wife's protection from the husband's creditors.

Wife's power of trading.

The power of trading given to a wife by the Act is of the most ample kind. The rights of a trader being conceded to her by the Act, it is conceived that she also incurs all the responsibilities incident to the carrying on of a trade. Under the provisions of section 9, she may be sued separately from her husband in respect of any of her separate debts, engagements, or contracts; and the effect of the whole Act was said by the Court, in *Merrick* v. *Sherwood*(*g*), to be to give to the creditors of a married woman remedies *against* her *co-extensive* with those given to her against all persons indebted to her, or with whom she may contract. If this be the true con-

Her liability to be sued.

Rights of wife's creditors.

(*a*) At p. 134.
(*b*) The statement of the effect of the second section in the judgment of the Court in Merrick *v.* Sherwood, 22 U. C. C. P., at p. 478, is scarcely correct.
(*c*) Offley *v.* Clay, 2 M. & Gr. 172.
(*d*) See McGuire *v.* McGuire, sup., at p. 134.
(*e*) Mason *v.* Mitchell, 3 H. & C., 528; 34 L. J., Ex. 68; Griffiths' Mar. Wom. Propy. Act, 11, n. (*a*.); the English Act, 20 & 21 Vict., c. 85, upon the construction of which the case of Mason *v.* Mitchell was decided, contains, however, the word "lawful," which, it will be observed, does not occur in the second section of our Act.
(*f*) 24 U. C. Q. B. 552.
(*g*) 22 U. C. C. P., 467.

SECTION 3.

She may be made bankrupt.

struction of the Act, it would seem that a married woman might be made a bankrupt(*a*). Under the old law in England, a wife could not be made a bankrupt(*b*). The question whether the trade is carried on by the wife alone is a question for the jury in each particular case(*c*).

She may enter into a trading partnership.

The wife having power to trade as a *feme sole* would seem to have the right to enter into a trading partnership without her husband's consent, a right which, if exercised, might frequently be productive of domestic complications; and there seems to be no obstacle to her trading in partnership with her husband.

Wife's power of investment.

There is no restriction in the Act as to the wife's power of investment. Certain specific privileges as regards investments are given her by sections 3 and 5; but it is conceived that she may invest her savings as she pleases.

Her investments in real estate.

Investments of the wife's separate earnings or profits in real estate will, as real estate, be impressed with the separate character; and a married woman will have a lien upon real estate partly purchased with her separate earnings to the extent of those earnings, though the conveyance should be taken in the husband's name(*d*).

Married women may insure their own or husbands' lives.

3. A married woman in her own name, or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or with his consent, the life of her husband for any definite period, or for the term of her or his natural life; and the amount payable under said insurance, shall be receivable for the sole and separate use of such married woman or her children as the case may be, free from the claims of the representatives of her husband, or of any of his creditors.

Wife's power to insure her life.

The third section gives a married woman power to insure her own life. The consent of her husband is, for obvious reasons of a domestic nature, necessary before she can insure his. The insurance may be either for a limited time, or for life. In the event of the wife's death intestate, it is presumed that the money arising from an insurance effected by her on her own life under this section, would, if she had no children, belong to her husband absolutely(*e*); but if she had children, it would belong to the husband and children in the proportion of one-third to the former, and two-thirds to the latter(*f*).

(*a*) See Griffiths' Mar. Wom. Propy. Act, p. 26.
(*b*) Roper, husb. and Wife, 175. But see *Ex parte* Franks 7 Bing., 763, 6 M. & P. 1, where the wife of a convicted felon, carrying on a separate trade, was held liable to be made a bankrupt. See also Williamson *v.* Dawes, 9 Bing., 292, 2 M. & Scott, 352.
(*c*) Macq., husb. and wife, 360.
(*d*) Scales *v.* Baker, 28 Beav. 91.
(*e*) Molony *v.* Kennedy, 10 Sim. 254,
(*f*) See sec. 17, of Con. Stat. U. C. c. 73.

SECTION 5.

Insurance by husband for the benefit of wife and children.

4. A policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or upon which he may at any time after effecting such insurance notwithstanding a year may have elapsed(*a*), endorse thereon that the same shall be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate, save and except for such amount as the same may be pledged to any person or persons prior to any endorsation thereon for the benefit of his wife or children, or any of them, when the sum secured by the policy becomes payable: in the event of no executor or trustee having been appointed by the husband by will, a trustee thereof may be appointed by the Court of Chancery upon the application of the wife, or in the event of her death, by the children or their guardian, and the receipt of such executor or trustee shall be a good discharge to the office in which such insurance is effected: Provided always, if it shall be proved that the policy of insurance was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

Appointment by the Court of trustee, if no other trustee or executor appointed.

Fraud in payment of premiums.

Former legislation as to insurance by wife.

In order to a right understanding of the provisions of the fourth section, it is necessary to advert to the prior legislation on the subject to which the section refers. By s. 1 of Stat. Can. 29 Vict. c. 17,

(*a*) Section 4 has been amended by 36 Vict. c. 19, s. 5, which substitutes the words "has heretofore or may hereafter" for the words "may at any time after effecting such insurance notwithstanding a year may have elapsed" in the fourth, fifth and sixth lines of the section. The word "endorsed" should have been inserted after the word "heretofore" in the amendment.

SECTION 4.

Stat, Can. 29 Vict. c. 17, sec. 1.

it was provided that any person might insure his life for the whole term thereof, or for a definite period, for the benefit of his wife, or of his wife and children, or of his wife and some or one of his children, or of his children only, or some or one of them, and might apportion the insurance money as he might deem proper amongst those for whose benefit the insurance might be effected.

Section 2.

Section 2 provided that such insurance might be effected either in the name of the person whose life was insured, or in the name of his wife, or of a trustee (with the trustee's consent); and provision was made that the premium might be paid by annual, half-yearly, quarterly, or monthly payments.

Section 3.

Section 3 provided that any person might, within one year from the passing of the Act, by writing indorsed upon or attached to any policy of insurance on his life which had been effected before the passing of the Act, declare that such policy and insurance should be for the benefit of his wife, or of his wife and children, or of his wife or some or one of his children, or of his children only, or some or one of them, and might apportion the amount of the insurance money as he might deem proper, when the insurance was declared to be for the benefit of more than one.

Section 4.

Section 4 provided that when no apportionment was made in any policy or declaration as aforesaid, all parties interested in the insurance should be held to share equally therein; and that when it was stated in such policy or declaration that the insurance should be for the benefit of the wife and children generally, or of the children generally, without specifying their names, then the word "children" should be held to mean all the children of the person whose life was insured, living at the time of his death, or whether by any other marriage or not.

Stat. Ont. 33 Vict. c. 21, s.1.

By Stat. of Ont. 33 Vict. c. 21, reciting in part the provisions of the former Act, and the inconvenience which had arisen to insurance companies and otherwise, from no provision having been made for the payment of the insurance money in the event of the children entitled thereto being under age, it is provided (by section 1):

Insurance moneys due to minors, may be paid to executors of the insured.

That in all cases where the party insured under any policy, has directed, or shall hereafter direct, the insurance money, or any portion thereof, to be paid to his child or children, without naming any person to receive the same on his or their behalf during his or their minority, it shall be competent to the assurance company granting such policy, to pay the amount due to such of the children as shall be minors, into the hands of the executor or executors of such insured person, whether such person shall have died before the passing of this Act or not, who shall hold the same as trustees for such children, and the receipt of such executor or executors shall be a sufficient discharge to the company.

If an insured die intestate, without appointing any one to receive the insurance moneys, they may be paid to a guardian for a minor.

Section 2 provides that "If the said insured shall have died, or shall hereafter happen to die intestate and without having appointed in writing any person to whom such payment may be made on behalf of such infants, the payment to a guardian of such infants, duly appointed by one of the Surrogate Courts of this Province, shall be a sufficient discharge to the assurance company for the money so paid, and the company shall not be bound to see to the application of the money, or be liable for the subsequent mis-

application thereof; but the guardian so appointed shall give security to the satisfaction of the Judge of such Court, for the faithful performance of his duty as guardian, and the proper application of the moneys which he shall receive." SECTION 4. Security by guardian.

Section 3 provides that "It shall be lawful for the trustee or trustees named in the last two preceding sections, to invest the moneys so to be received, upon Government securities or muncipal debentures, or on mortgage of real estate, with full power from time to time, to alter, vary, and transpose the same, and to apply all or any part of the annual income arising from the share or presumptive share of each of the children, of and in the said trust funds, in or towards his or her maintenance and education in such manner as the trustee or trustees may think fit, and also to advance unto and for each or any of the said children notwithstanding his or her minority, the whole or any part of the presumptive share of the same child of and in the said trust moneys for the advancement or preferment in the world or in marriage of any such child." Powers as to insurance moneys due to minors.

Section 4 provides that "If a person who has effected or shall hereafter effect an insurance in the terms of the said Act, shall find himself unable to continue to meet the premiums, it shall be lawful for him to surrender the policy to the company granting the same, and to accept in lieu thereof a paid up policy for such sum as the premiums paid would represent, payable at death in the same manner as the original policy; and the said company may accept such surrender, and grant such paid up policy notwithstanding any such declaration, or direction in favour of the wife and children or any or either of them of the insured." Power to surrender policy.

Section 5 provides that "It shall be lawful for the person insured, from time to time to borrow on the security of the policy such sums as may be necessary to keep the said policy in force, and the sums so borrowed shall be a first lien on the policy, notwithstanding any such direction in favor of the wife and children or any or either of them. Power to borrow on the policy.

Section 6 provides that, "In the event of some of the parties for whose benefit the said insurance has been effected, dying in the lifetime of the insured, the moneys payable thereunder shall be payable to the survivor or survivors of such parties, or in case they shall also die, to the executors or administrators of the assured, but nothing herein contained shall be held to prevent the said assured from assigning the policy for the benefit of any future wife or children, or executing a declaration in their favor or in favor of some or one of them as hereinafter is mentioned." Provision in case of death before the insured of any one beneficially entitled.

Section 7 provides that "Any person insuring with profits may apply the same either in payment of premiums, or direct them to be added to the insurance money, payable at death." Profits on a policy may be applied to pay premiums or added to insurance.

By Stat. Ont., 36 Vict. c. 19, reciting the Act, 29 Vict. c. 17, and the provision therein, that premiums on the policies of insurance therein referred to, might be payable during the whole period of the life of the insured, or during any lesser period by annual, half-yearly, quarterly, or monthly payments; and reciting also that doubts existed whether that Act and the amending Act 33 Vict. c. 21, applied to policies of insurance effected by the payment of one um as such premium, and to policies effected for a limited term of 36 Vict. c. 19. (Ont.)

SECTION 4.

years, and the expediency of removing the said doubts, it is provided by

29 V., c. 17, and 33 V., c. 21, to apply in cases of payment of one premium for whole term.

Section 1 "The said Acts recited in the preamble of this Act shall apply to policies of insurance effected for the purposes of the said Acts by the payment of one sum as the premium for such insurance, and to policies of insurance effected in like manner for a limited term of years; and the said acts shall be read and construed as if this Act formed part of the said Acts at the time of the passing of the said Acts.

Certain policies made valid.

Section 2 provides that "All such policies of insurance as have heretofore been effected in the manner set forth in the first section of this Act, and in pursuance of the said Acts in the preamble recited, are hereby made valid and effectual as if made in pursuance of and under this Act."

Insured may on death of any beneficiary reallot the share of deceased.

Section 3 provides that "In the event of some of the persons for whose benefit an insurance under the said Acts, or this Act, has been effected, dying in the life time of the insured, it shall be lawful for the said insured after the death of such person, by any instrument in writing attached to or endorsed upon the policy of insurance, to declare that the share formerly allotted to such person or persons, shall be for the benefit of such other person or persons as the said insured may determine; and it shall be further lawful for the said insured from time to time, by any further or other instrument in writing attached to or endorsed on such policy, to alter the shares and allotments of such insurance money among the parties entitled to be benefited as he may deem proper"

Insured may direct application of bonuses and profits.

Section 4 provides that "Any party who has effected, or who may hereafter effect any such policy of insurance under the said Acts or this Act, may in writing require the assurance company issuing such policy to apply the bonuses or profits accruing thereunder, or portions of the same in reduction of the annual premiums payable by such insured in such way as he may direct; or he may require the said bonuses or profits to be added to the policy; and the said insurance company shall apply such bonuses or profits as such insured shall direct, and according to the rates established by such company.

35 V., c. 16, s. 4, amended.

Section 5 provides that "Section four of the Act passed in the thirty-fifth year of the reign of Her Majesty, chaptered sixteen, and intituled "An Act to extend the rights of property of Married Women," is hereby amended by striking out the words "may at any time after effecting such insurance, notwithstanding a year may have elapsed" in the fourth and fifth lines of the said section, and inserting in lieu thereof the words "has heretofore or may hereafter."

Effect of 4th section 35 Vict., c. 16.

The 4th section of 35 Vict. c. 16, effects a settlement to the separate use of a married woman of a policy effected in her favour, or assigned to her under the provisions of 29 Vict. c. 17.

Rights of husband's creditors.

The right of the creditors of the husband, in fraud of whom a policy may have been effected and premiums paid, is limited to an amount equal to the premiums so paid in fraud of creditors, leaving the insurance money purchased by the premiums the property of those for whose benefit the policy was effected.

SECTION 5.

Married women may hold stocks, &c., and vote.

5. Any married woman may become a stockholder or member of any bank, insurance company, or any other incorporated company or association, as fully and effectually as if she were a feme sole, and may vote by proxy or otherwise, and enjoy the like rights, as other stockholders or members.

Rights conferred by section 5.

The rights conferred by this section are much more extensive than those of the same class conferred by the English Act. A married woman has, in fact, the same rights as a stockholder as are possessed by men. They enjoy the same rights as *other* stockholders or members, the word "other" no doubt referring particularly to those of the other sex. Hence it may be assumed that a married woman is eligible to any position in the company which a man may now occupy.

McGuir McGuire.

Respecting section 5, Mr. Justice Gwynne, in *McGuire* v. *McGuire*(*a*), remarks, "This section involves a recognition by the Legislature that until the passing of the Act, and except under its provisions, although a married woman may be entitled to bank stocks, or to stocks in other companies whose capital is personal estate, still that she had not the full enjoyment of it, in so far as exercising the power of disposition over it, but that, as to such property, the consent and intervention of her husband was necessary to its enjoyment, although by Consol. Stat., ch. 73, she might have such an interest as would enable her in equity to restrain any attempt upon his part to dispose of it without her consent."

May deposit in a bank and check out.

6. A married woman may make deposits of money in her own name in any savings or other bank, and withdraw the same by her own check, and any receipt or acquittance of such depositor, shall be a sufficient legal discharge to any such bank.

Deposit of money in a bank.

A deposit of money with a banker, in the ordinary way, renders the banker the customer's *debtor*(*b*); therefore, a balance at a banker's is a chose in action. Such a balance, belonging to a wife, did not become the property of the husband unless reduced into possession by him; but the husband had a right to sue for and recover it, and the receipt by the wife was not a good discharge. The Act now, however, authorizes her to withdraw such money by her own check, and provides that any receipt or acquittance given by her shall be a sufficient legal discharge to the bank in which the deposit is made.

Wife may now withdraw money by her own check.

Wife's rights as executrix or administratrix.

The power given by this section suggests a consideration of the position now occupied by a married woman in reference to her

(*a*) 23 U. C. C. P., at p. 133.
(*b*) Hill v. Foley, 1 Phill., 404; 2 H. L. C. 28.

SECTION 6.

At common law.

rights and liabilities as an executrix or administratrix. Property which a wife held in either of those characters was not at common law given by the marriage to the husband, as was personal property which she held in her own right. But the husband was, nevertheless, entitled to administer in his wife's right for his own safety, lest she might misapply the funds for which he would be liable ;

Husband's authority.

and, as incident to this right, he had the power of disposition over the personal estate vested in his wife as executrix or administratrix, and he might release debts owing to the estate of the testator or intestate to whom the wife was executrix or administratrix. The husband being answerable for his wife's acts, she was not permitted to administer without his concurrence ; nor were payments made to the wife, as executrix or administratrix, without his consent, valid payments(*a*).

Wife's position under Con. Stat. U. C., c. 73.

We have already seen(*b*) that the provisions of Con. Stat. U. C., c. 73, did not empower a married woman to act as an administratrix independently of her husband, and did not relieve the husband from responsibility for a devastavit committed by her. That Act does not, in fact, appear to have effected any change in the law regarding the right of a married woman to be an executrix or administratrix without her husband's consent, or regarding his liability for her acts in either of those characters.

Character of a devastavit.

A devastavit is a tort ; and the liability of a husband for his wife's torts was founded upon the principle that a wife could not, at common law, be sued separately from her husband, and that, if the husband were also protected from liability, the injured party would be entirely without redress(*c*). Macqueen remarks that the ground upon which a husband was held answerable for his wife's devastavits, or other acts done by her as executrix or administratrix, may be collected from the circumstance that these are offices that she can assume only with his sanction or approbation(*d*).

Reason of wife's disability to be executrix, &c.

But the reason why the wife could not assume these offices without her husband's consent was, that the husband was responsible for her devastavits ; and the reason why he was thus responsible was, as we have seen, that she could not be sued alone for them.

Wife may now be sued alone for her torts.

But *cessante ratione cessat ipsa lex.* The wife may now, under the provisions of the 9th section, be sued or proceeded against separately from her husband, in respect of any of her separate torts, as if she were unmarried. The obstacle which formerly existed to the assumption by a wife of the character of an executrix or administratrix, at her own pleasure, seems, therefore, to have been removed by the 9th section(*e*).

Rights of husband's creditors to deposits.

7. Nothing hereinbefore contained in reference to moneys deposited, or investments by any married woman shall, as against creditors of the husband, give validity to

(*a*) 1 Roper, Husb. and Wife, 188.
(*b*) *Ante*. p. 20.
(*c*) Macq. Husb. and Wife, 133.
(*d*) Macq. Husb. and Wife, 133.
(*e*) As to the inference to be drawn from the 6th section, respecting the pre-existing law, see the remarks of Gwynne, J., in *McGuire* v. *McGuire*, 23 U. C. C. P., at p. 133.

any deposit or investment of moneys of the husband made in fraud of such creditors, and any money so deposited or invested may be followed as if this Act had not passed. SECTION 7.

Construction of 7th section.

Frauds on husband's creditors.

Section 7 is intended to set at rest any doubt that might be created by the Act as to the right of the husband's creditors to follow money or property fraudulently given to the wife to defeat the claims of creditors. It could hardly have been contended, independently of the provisions of this section, that the former law as to dispositions of property in fraud of creditors had been altered; but the status given to a married woman by this Act affords peculiar facilities for the commission of frauds of the character referred to.

Fraudulent assignment of husband's property to wife.

Transactions between the wife and husband, by which the husband's property passes into the wife's hands, will, in favour of the husband's creditors, be regarded by the Courts with even more jealousy than formerly; and the altered position of the wife, with respect to the responsibilities imposed on her, will, no doubt, give rise to a new class of fraudulent transactions, in which the current will be found flowing from the wife to the husband. Conveyances or dispositions of property by the wife to the husband or others, with the view of defeating the claims of the wife's creditors, may be expected to occupy the attention of the Courts; and the general principles laid down in the very numerous cases respecting fraudulent conveyances or settlements are the same principles which will, no doubt, be acted on in cases arising in consequence of the altered relations between husband and wife created by this Act.(*a*)

Non-liability of husband for debts of the wife.

8. A husband shall not by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued therefor, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried; and a husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

Construction of 8th section. Merrick *v.* Sherwood.

Respecting the provisions of section 8, Mr Justice Gwynne, in a recent case(*b*), remarks, "Section 8 is the only section which is

(*a*) These principles will be found fully stated in "May on Voluntary and Fraudulent Conveyances." Any discussion of them in this place would be impossible.
(*b*) Merrick *v.* Sherwood, 22 U. C. C. P., at p. 478.

SECTION 8.

limited to marriages which shall take place after the passing of the Act. The reason of this is not very apparent, unless it be because it is a transcript of the twelfth section of the English Act of 1870. The first part of that section is limited to future marriages; and the effect seems to be to leave the liability of a husband married before the Act, for the debts of the wife incurred before her marriage, as it stood under the Consol. Stat. U. C., ch. 73, but to provide that, in the case of future marriages, no liability whatsoever shall attach upon the husband for the debts of his wife contracted before her marriage; but that she, individually, shall be liable to be sued therefor, and that her separate estate (if she have any) shall alone be liable to satisfy such debts; but the latter part of the section appears to apply to *all* married women, whether married before or after the passing of the Act: namely, that a husband shall not be liable for any debts of his wife, in respect of any employment or business in which she is engaged, or in respect of any of her own contracts."

Sanger *v.* Sanger.

The learned Judge further observes(*a*), that "In a recent case before the Master of the Rolls(*b*), it has been decided that, since the passing of 'The Married Women's Property Act of 1870,' the operation of the twelfth section, which is almost identical with the first part of the eighth section of our Act, 35 Vict., ch. 16, is, to subject property settled to the separate use of a married woman, without power of anticipation, to the satisfaction of a debt incurred by her before her marriage, and the reason given is, that as the liability of the husband is taken away, it was only just that the liability should be fastened on the whole of the property of the wife, even though settled upon her subject to a restraint on anticipation.

Creditors' remedies against wives.

"So, likewise, with respect to our Act, it may be said that, as the intention of the Act is plainly to assimilate the condition of a married woman to that of a feme sole as affects her property, debts, contracts, engagements, or torts, the remedies incident to that status in favour of creditors should be co-extensive with the remedies given to the married woman against all persons indebted to her, or with whom she may contract. Accordingly, we find the ninth section of our statute introduced to give to the married woman, to whom, by the other sections of the Act, the status of a feme sole is given, the remedies incidental to such a status, and subjecting her to be sued or proceeded against separately from her husband, in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried."

Husband exempted from wife's debts.

The latter part of section 8 exempts a husband from liability for any debts of his wife incurred in any employment or business in which she is engaged in her own behalf, or in respect of any of her own contracts.

Words "her own contracts," how construed.

The words, "her own contracts," may create some doubt. The question might be asked, What contracts made by a married woman are to be considered *her own* contracts, so as to exempt her husband from liability for them?

(*a*) P. 479.
(*b*) Sanger *v.* Sanger, L. R. 11 Eq., 470.

SECTION 9.

Husband liable at common law for wife's contracts.

Wife husband's agent.

Wife's authority as husband's agent to order necessaries.

Question for jury —Had wife authority to bind husband?

Limitation of wife's authority to bind her husband

At common law, the principle on which a husband was held liable for his wife's contracts was, that she was acting as his agent, and with his authority(*a*); except as his agent, a wife had no power to render her husband responsible by her contracts.

As his agent, she had an implied authority to contract for necessaries suitable to his degree and estate(*b*).

The proper question for the jury in each case, however, is not merely whether the goods in respect of which the action was brought were necessaries suitable to her station, but whether, upon the facts proved, she had any authority, express or implied, to bind her husband by the contract(*c*).

It has been held that a husband who supplied his wife with necessaries suitable to her position, is not liable for debts contracted by her without his previous authority or subsequent sanction(*d*); and that where the wife had a separate income, the husband was not liable even for necessaries(*e*). So, too, where the order given by the wife is extravagant, and is out of proportion to the husband's means, he will not be liable(*f*). And when the wife is living apart from her husband, the onus is on the tradesman to show that she had authority to bind him(*g*).

Instance of wife's right to bind husband.

On the other hand, where a husband went to British Columbia, leaving his wife in this Province, and she procured a friend to endorse a note for her to raise money for the purchase of furniture, wherewith she proposed to carry on a boarding-house, and thus support herself, a mortgage executed by her alone on the furniture, to the endorser, for his protection, was, in an action by the husband against the mortgagee for seizing the furniture, held valid, on the ground that the wife had authority, as the husband's agent, to assent to the seizure(*h*).

Existing law no altered by the Act.

There is no reason to conclude that the pre-existing law with respect to the limitation of a wife's power to bind her husband by contracts is changed by the Act, or that the Act, independently of the concluding words of the 8th section, authorizes her to bind her husband by her contracts otherwise than as his agent. The mere creation of a power in a married woman to contract would not necessarily involve a power of making her husband responsible for the fulfilment of the contract, or for the consequences of non-fulfilment. The provision that the husband shall not be responsible was, therefore, probably introduced to prevent any possible doubt arising upon the question. A wife's "*own* contracts," within the meaning of the 8th section, will probably be held to be such contracts as she may make otherwise than as the authorized agent of her husband.

(*a*) Manby *v.* Scott, Smith's L. C., vol. 2, 380, 5th ed.
(*b*) Macq. Husb. and Wife, 137; Etherington *v.* Parrot, 1 Salk., 118; Clifford *v.* Layton, 3 C. & P., 15; Ruddock *v.* March, 1 H. & N., 601. As to what are necessaries, see Ryder *v.* Wombwell, L. R., 4 Ex., 32.
(*c*) Reid *v.* Teakle, 13 C. B., 627.
(*d*) Reneaux *v.* Teakle, 8 Ex., 680; Archibald *v.* Flynn, 32 U. C. Q. B., 523; Zealand *v.* Dewhurst, 23 U. C. C. P., 117; Jolly *v.* Rees (inf.); Seaton *v.* Benedict, 5 Bing., 28.
(*e*) Jolly *v.* Rees, 15 C. B. N. S., 628; 33 L. J. C. P., 177.
(*f*) Phillipson *v.* Hayter, L. R. 6 C. P., 38; Morgan *v.* Chetwynd, 4 F. & F., 451.
(*g*) Edwards *v.* Towels, 5 M. & G., 624; Hindley *v.* Westmeath, 6 B. & C., 200; Zealand *v.* Dewhurst (sup.)
(*h*) Halfpenny *v.* Pennock, 33 U. C. Q. B., 229; 9 Can. L. J. N. S., 309.

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rying on ss whilst g with sband.

It has been held that when a husband permits his wife, who is living with him, to carry on business, and the husband participates in the profits of the business, the business must be considered the husband's, and the wife will be regarded as his agent, so as to bind him by her promise to pay for goods supplied to carry on the trade(*a*).

Modification of old rule.

There is no doubt, however, that, since a married woman is empowered by the Act to carry on business for her own benefit, and to enter into contracts, the old rule must be modified to a considerable extent.

Suits by and against married women.

9. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property, by this or any other Act, declared to be her separate property, and shall have in her own name the same remedies, both civil and criminal against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

Construction of 9th section.

Merrick *v.* Sherwood.

The 9th section is to be construed as simply giving the appropriate remedies both *to* and *against* a married woman, which it was but just and proper should exist in connection with her altered status under the Act. Coupled, therefore, with the remedies given *to* her for the recovery of the property, by this or any other Act, declared to be her separate property, including, therefore, retrospectively, property accruing under section 6 of Consol. Stat. U. C., ch. 73, the section provides suitable remedies *against* her—namely, that she may be sued separately from her husband, as if she were unmarried, for her separate debts, engagements, contracts, and torts, thereby enabling her to be sued *at law* as if she were sole in respect of a debt; whereas before the Act, she could only have been sued *in equity*, and, with respect to her torts, to be sued *alone*, whereas before the Act, she could only have been sued *jointly with her husband*(*b*).

Object of the 9th section.

The object of the introduction of this section is stated to be to give to the married woman, to whom, by the other sections of the

(*a*) Foulds *v.* Curtelett, 21 U. C. C. P., 363. In this case, C. J. Hagarty reviews the English authorities.
(*b*) Per Gwynne, J., in Merrick *v.* Sherwood, 22 U. C. C. P., at p. 480

SECTION 9.

Act, the status of a feme sole is given, the remedies incidental to such a status, and subjecting her to be sued or proceeded against separately from her husband, in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried(*a*).

Wife may be sued on a contract made before the Act.

The case of *Merrick* v. *Sherwood*(*b*) decided that, under the 9th section, an action *at law* might be maintained against a married woman, in respect of a debt incurred by her, upon the faith of her separate estate, *before* the passing of the Act.

This decision was followed in the more recent case of *Steele* v *Hullman*(*c*), in which it was held that the statute authorized the maintenance of an action against a married woman, in respect of a contract made by her, *before* the passing of the Act, for the building of a house upon her own land.

Act defective.

It was suggested, however, in *Merrick* v. *Sherwood*, that the Act was defective, in not providing a remedy *at law* in those cases in which the wife's separate property consists of money paid from time to time into her hands by trustees or executors holding it for her separate use. In such cases, it seems to be still necessary to go into equity to obtain the benefit of the judgment recovered at law(*d*).

Averment in declaration.

It is not necessary, in proceeding against a married woman at law, under this section, to aver in the declaration that she is a married woman(*e*).

Change in procedure.

The 9th section effects a radical change in the old rules by which actions by or against married women were governed. Neither at law nor in equity could a married woman, unless in certain exceptional cases, sue or be sued, unless her husband was a party.

A wife may sue alone in equity.

A wife may now sue alone in equity, in respect of her separate property, without a next friend. In such a case, however, under the Imperial Act, a doubt has been expressed whether the defendant may not be entitled to security for costs(*f*).

But only in respect of separate property.

It would appear, however, that it is only in respect of her *separate* property that the wife may sue alone, in her own name; and that, when the suit is in respect of other than separate property, the wife must still sue by a next friend(*g*).

Husband need not be a defendant.

And the wife being entitled to hold her separate property as a feme sole, it is to be presumed that the husband need not be made a defendant. Should the husband be joined as a plaintiff with the wife, the latter must still, notwithstanding the provisions of the Act, sue by a next friend. The rule that when husband and wife join in any pleading or proceeding, the husband is to be considered *dominus litis*, so as to relieve the wife from being bound by the result, has been considered to be still in force.(*h*)

(*a*) Per Gwynne, J., in Merrick *v.* Sherwood, sup., at p. 478.
(*b*) Sup.
(*c*) 33 U. C. Q. B., 471.
(*d*) This inconvenience is no doubt removed by the provisions of "The Administration of Justice Act of 1873," 36 Vict., c. 8, s. 8.
(*e*) Merrick *v.* Sherwood, sup.
(*f*) Griffiths' Mar. Wom. Propy. Act, p. 26, referring to Picard *v.* Hine, L. R., 5 Ch. Ap., 275.
(*g*) Redman *v.* Brownscombe, 9 Can. L. J. N. S., 192.
(*h*) In re Spencer & McDonald, 19 Grant, 467.

SECTION 9.

Necessity for joining husband as defendant. McFarlane v. Murphy.

In the recent case of *McFarlane* v. *Murphy*(*a*), it was held that, in a suit in equity, brought by an assignee in bankruptcy, to set aside a mortgage made by the insolvent to a married woman, on the ground of fraudulent preference, the husband was not a necessary party defendant, no relief being sought against him, and a demurrer by the husband was allowed. The remarks of the learned Chancellor are instructive and important, and are as follows :—

Old rule as to parties.

"In suits against a married woman, in respect of her separate estate, the English authorities shew that her husband should be made a party, except in some excepted cases, which it is not necessary to consider. For this there is the authority of Lord Redesdale(*b*), of Mr. Daniell, of Judge Story, of Mr. Calvert, and I find that in *Murray* v. *Barlee*(*c*), before Sir Launcelot Shadwell(*c*), where nothing was sought against the husband, but the only remedy asked for was against the separate estate of the wife, the husband as well as the wife, and the trustee of the wife was made a party. There was, too, in that case a demurrer by the wife for want of equity, but none by the husband on any ground whatever. The authorities to which I have referred treat it as a settled rule that in such suits the husband not only *may* be, but *must* be, made a party. This being a demurrer by the husband, on the ground that he ought not to be made a party, it is sufficient for the plaintiff to show that he is a *proper* party ; it does not lie upon him to show that he is a *necessary* party.

No charge in bill against the husband.

"This bill contains no charges that would make him a proper party for the purpose of obtaining any relief against him in the way of costs or otherwise. If not the husband of the principal defendant, he could clearly demur ; and so, if a necessary party, it must be for the sake of conformity, because he is husband of the principal defendant.

"Unless section 9 of 'The Married Woman's Property Act, 1872,' makes a difference, I must hold that the husband of the female defendant in this case is a proper if not a necessary party." After reading the 9th section, his Lordship continued :—

To what extent a married woman may be sued.

"If the matters in respect of which a married woman may be sued were stated in as comprehensive terms as the matters in which she may sue, the husband in this case would certainly not be a necessary party. One might think, upon first reading the clause, that the same words might have been used in the second branch of the clause, or referred to without repetition, as in the first ; but some of the language would be inappropriate, *e. g.* that a married woman may be sued in respect of her wages and earnings. The word 'property' might, however, have been added with propriety, as a matter in respect of which a married woman might be sued separately, and that would have been sufficient to meet this case. Is it a proper inference that the Legislature meant that a married woman might be proceeded against separately, in respect of her separate debts, engagements, contracts, and torts, but not in respect of her separate property? There is nothing in the Act to

(*a*) Cor. the Chancellor, 11th February, 1874.
(*b*) Mitford, 30.
(*c*) 4 Sim., 86.
(*d*) And in appeal, 3 M. & K., 309.

lead to this inference ; and the concluding words of the 1st section lead me to a contrary inference :—'And any married woman shall be liable on any contract made by her respecting her real estate as if she were a feme sole.' SECTION

"Reading this with section 9, I should say that she might, in respect of any such contract, be sued separately ; and this would be a suing or proceeding against her in respect of property. I refer to this only as an indication of the intention of the Legislature that a married woman may be sued separately in respect of property. The clause, indeed, is dealing with real estate ; but, for the purpose for which I use it, it furnishes the same argument as if it were dealing with property generally. It is an *a fortiori* argument, that if the Act empowers a woman to contract in respect of her real estate, and makes her liable to be sued separately in respect of it, it could not be intended that she might not deal and be dealt with as freely in relation to her personalty.

"The question here is not a question of property or of civil rights, but a question of procedure. In a certain class of cases, at any rate, the Legislature has declared that a married woman may be proceeded against separately from her husband, and a new rule of procedure has thus been introduced. The question now is, whether this Court can hold the old rule to apply in cases where there is no substantial reason for retaining it. 'Conformity' is not a substantial reason, and Mr. Moss probably felt this when he contended that there were reasons for the husband being a party in this case. Question one of procedure, not of property. Conformity no reason for joining husband.

"He contended that, by the mortgage, a legal title passed to the husband, which could not be got out of the husband unless he were made a party. I should admit the cogency of this argument if this were a bill in which a conveyance was sought, or was in any way necessary to the relief to which the plaintiff may be entitled ; but it is not so. The conveyance is void as against creditors, and void only so far as is necessary to satisfy the debts of the creditors, and no conveyance is sought or needed. Conveyance of legal estate not required.

"It is further contended that the husband has an interest in defending this suit, inasmuch as, in the event of the wife dying intestate, a beneficial interest would pass to him. But the same reason would render it necessary to make a presumptive heir a party, which is clearly not necessary. I think the husband is not a necessary or a proper party on either of these grounds. Husband's interest no sufficient justification for making him a party.

"Then what is the effect of the provision in the Act of 1872, that a married woman may be proceeded against separately from her husband ? Take one of the cases especially mentioned, *e. g.*, a suit in respect of a contract entered into by her, and her husband made a party. I have no doubt that he might object by demurrer. The statute making it unnecessary to make him a party, the making him a party would have no ground to rest upon, either of necessity or propriety ; and he might well object that he ought not to be brought into litigation, as he does object in this case. Effect of section 9 considered.

"In the common law cases to which I have been referred, the question raised by this demurrer did not arise. It is, therefore, a case of first impression ; and, upon the best consideration that I have been able to give to the question, my conclusion is, that under Rule in common law cases.

SECTION 9.

the Act of 1872, and since the passing of that Act, there is no good reason for making the husband a party in such a case as this, and that one of the objects of that Act was to make the wife the party, and the proper party, to be sued *separately and alone.*

Allegations in bill considered.

"I have said that there are no sufficient allegations in the bill to charge the husband as *particeps fraudis;* they do not go beyond this, that the defendants had notice of the insolvency of the mortgagor, and of some other facts, these allegations not pointing to any connivance or participation in fraud; and the husband is made a party by amendment, because of his being the husband of the mortgagee. The allegation is, that he is the husband of the defendant, Abigail Murphy, and has, *therefore*, been made a party—I cannot help thinking by mistake, because it was necessary to make him a party under the Act of 1859, and overlooking the change made by the 9th section of the Act of 1872.

Conclusion—Husband an unnecessary party.

Meaning of word "torts" in 9th section.

"I have not alluded to the word 'torts' in section 9 of the Act of 1872. I am inclined to think that it applies to the Acts of the married woman complained of in this Bill. The word, in its largest sense, 'wrong doings,' would apply; for the Bill alleges that the mortgage which is impeached was made in pursuance of a fraudulent agreement entered into between the parties to defeat creditors. The Statute does not use the words 'actions of tort,' but 'torts,' and may well apply to such wrongs as are charged in the Bill. The demurrer is allowed."

Wife may be sole defendant in ejectment.

A wife may, under the Act, be a sole defendant in an ejectment brought to recover land owned by her husband of which she is in possession, the husband being permanently resident out of the Province(*a*).

Extent of wife's remedy.

The wife, it will be observed, has a civil and criminal remedy against *all persons whomsoever* for the protection and security of her wages, earnings, money, and property by this or any other Act declared to be her separate property, and of her chattels or other her separate property for her own use. These words are sufficiently ample to justify a civil or criminal proceeding against the husband(*b*).

The disability of a married woman to sue being abolished by this Act, it would seem that coverture should cease to be a disability within the Statutes of Limitation.

Husband's responsibility for wife's torts.

The effect of the 9th section upon the husband's responsibility for the wife's torts has already been noticed(*c*). This liability, though not expressly abolished by the Act, would seem to have ceased to exist(*d*).

Rights of wife's creditors against her estate.

After the death of a married woman, her creditors may obtain a decree for the administration of her separate property(*e*).

Pending suits.

10. This Act shall not affect any pending suit or proceeding.

(*a*) Warren *v.* Cotterell, I New Prac. Rep., 11.
(*b*) See, however, the remarks of Gwynne, J., in McGuire *v.* McGuire, 23 U. C. C. P., at p. 136.
(*c*) Ante, p.
(*d*) See as to the construction of the word "torts," McFarlane *v.* Murphy, sup.
(*e*) Owens *v.* Dickenson, 1 Cr. & Ph., 48.

11. This Act may be known as the "Married Women's Property Act, 1872." SECTION 11. Short title.

AN ACT

TO FACILITATE THE

CONVEYANCE OF REAL ESTATE

BY

MARRIED WOMEN.

XXXVI VICT., (ONT.) CAP. XVIII.

(*Assented to 29th March*, 1873.)

1. This Act may be cited as "The Married Woman's Real Estate Act, 1873." Short title.

2. In this Act the term "real estate" extends to lands, chattels real, rents and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof; to any estate, right or interest therein, whether legal or equitable; to any charge, lien or encumbrance in, upon or affecting real estate, either at law or in equity; to money subject to be invested in real estate; and to any interest charge, lien, or encumbrance in, upon, or affecting such money as aforesaid. Interpretation of certain terms in this Act. "Real Estate."

The term "judge" means a judge of one of the superior courts, a judge of the county court, or a junior or a deputy judge. "Judge."

SECTION 2.

Meaning of term "real estate."

The interpretation clause of a statute should be examined with peculiar attention, the effect of such a clause being, in many cases, to give to words used in the Act a meaning quite at variance with their ordinary signification. The attention of the reader of this Act is directed to the meaning attributed to the term "real estate" by the foregoing section.

Powers of wife under 35 Vict., c. 16.

It may be observed that a married woman, under the authority of 35 Vict., c. 16, already possessed, when this Act was passed, a power of disposing, by her own deed unacknowledged, of money subject to be invested in real estate, and of any interest, charge, lien, or encumbrance in, upon, or affecting such money. What her rights were in respect of other classes of property included in the term "real estate," will be found in the notes to section 3.

A married woman, with her husband's concurrence may convey real estate or any interest therein and release and extinguish powers and appoint an attorney as a *feme sole*.

3. Every married woman being of the full age of twenty-one years, may, by deed, convey her real estate and convey, release, surrender, disclaim or extinguish any interest therein, and may also, by deed, release or extinguish any power which may be vested in, or limited, or reserved to her in regard to real estate; and may also, by deed, appoint an attorney or attorneys for the purposes aforesaid, and every of them as fully and effectually as she could do if she were a *feme sole;* save and except that, unless hereinafter otherwise provided, no such conveyance, release, surrender, disclaimer or extinguishment shall be valid or effectual unless the husband is a party to and executes the deed by which the same shall be effected; and save and except also that no such deed appointing an attorney shall be valid or effectual unless the husband is a party to, and executes the same, or the deed executed in pursuance thereof.

Con. Stat. U. C., c. 85, s. 1.

By Con. Stat. U. C., c. 85, s. 1, it was provided that "Any married woman seized or entitled to real estate in Upper Canada, and being of the age of twenty-one years, may, subject to the provisions hereinafter contained, convey the same by deed to be executed by her jointly with her husband, to such uses as to her and her husband may seem meet."

That Act repealed.

That section is repealed by the fourteenth section of the new Act, and the third section is substituted in its stead. The conveyance by the married woman must be by deed; and, as required by the old statute, her husband must be a party to, and must execute the conveyance.

SECTION 2.

Disability of infancy.

The disability of infancy is not removed by this Act, which enables only married women of the full age of twenty-one years to convey their real estate.

Construction of 3rd section.

Classification of wife's real estate.

The true construction of the third section is involved in some obscurity, in consequence of the changes in the law which have been effected by 35 Vict., c. 16. The real estate owned by married women in this Province may be classified as follows :—

1st, Unsettled real estate acquired before the passing of 35 Vict., c. 16.

2nd, Unsettled real estate acquired since the passing of 35 Vict., c. 16.

3rd, Real estate settled to the separate use of a married woman by settlement.

1st class.

It has already been shown that real estate comprised in the first class could not be conveyed by a married woman except in the manner prescribed by Con. Stat. U. C., c. 85(*a*).

3rd class.

It has also been shown that a married woman enjoyed the privilege of conveying her equitable interest in property comprised in the third class by her own deed unacknowledged(*b*); and it is conceived that she possessed a similar privilege with respect to property comprised in the second class(*c*).

2nd class.

Changes in the law.

Keeping in view the foregoing classification, it is proposed to suggest some possible changes which may have been effected by the new statute ; but, in so doing, it is not intended, in the absence of authority, to offer any decided opinions.

Exception in 3rd section.

By the latter part of section 3 it is enacted that, *unless hereinafter otherwise provided*, no *such* conveyance, release, &c. (as is therein-before referred to) shall be valid or effectual unless the husband is a party to, and executes the deed by which the same shall be effected. Section 11 provides that "The powers of conveying given by this Act to a married woman shall not impair or affect any powers which, independently of this Act, may, either by statute, contract, or settlement, be vested in or limited or reserved to her, so as to prevent her from exercising such powers in any case, except so far as by any conveyance made by her under this Act, she may be prevented from so doing in consequence of such powers having been suspended or extinguished by such conveyance."

Section 11.

Mode of conveying property in 1st class.

It seems clear that the first class of property above referred to can be conveyed only in the manner prescribed by the third section ; but there remains the question, Does the Act affect the privilege which a married woman has hitherto enjoyed of alienating her real estate settled to her separate use ? The power of alienating such property has been regarded and conceded by the Courts of Equity as one of the incidents of the wife's separate ownership ; and this power may, therefore, be said to be vested in the wife by the settlement by which real estate is settled to her separate use.

Effect of the Act on power of conveying property settled to separate use.

Effect of settlement.

Such a settlement is regarded as conferring on a married woman a power of disposition over the property comprised in it. The same arguments seem to be applicable to the Statute 35 Vict., c. 16 ; 35 Vict., c. 16.

(*a*) See notes to s. 1 Con. Stat. U. C., c. 73, ante, pp. 16, 17.
(*b*) Ante, pp. 4, 5.
(*c*) See notes to s. 1, 35 Vict., c. 16, ante, p. 38.

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and that Statute, operating as a settlement to the separate use of the wife, may, therefore, be said to have vested in the wife a power of disposition over her real estate acquired after the passing of the Act. If this argument be correct, it follows that the power of disposition enjoyed by the wife, in respect of the second and third classes of property above referred to, being a power which, independently of the new Act, is, by statute in one case, and by settlement in the other, vested in or limited or reserved to her, is not impaired or affected by the new Act.

Scope and objects of 35 Vict., c. 16.

This view is strengthened by a consideration of the scope and objects of the Statute 35 Vict., c. 16, as explained more particularly in the case of *Merrick* v. *Sherwood(a)*. One of the objects of that Act was to render the property of a married woman liable for her own engagements. If the wife is disabled by the new Act from *directly* conveying *any* interest in her real estate without her husband's concurrence, it should seem, on principle, that she should not have the right, without the same concurrence, of *indirectly* affecting or charging her real estate. If, on the other hand, as is undoubtedly the case, a wife has power to make her separate real estate liable for the satisfaction of her breaches of contract, she should also, on principle, possess the power of *direct* alienation in respect of that estate.

Limited effect of 36 Vict., c. 18.

Assuming that a *married woman* can, by *her* own deed, convey her equitable interest in her unsettled real estate acquired after the passing of 35 Vict., c. 16, it follows that the scope and effect of the new Act will be more narrow and limited than was probably intended by its framers.

Whilst, on the one hand, it would seem unlikely that it was intended by the Act to restrain the power of alienation conceded by the Courts of Equity to married women over their real estate settled to separate use; it would also, on the other hand, seem unlikely that it was intended to permit the alienation by a wife, by her own deed, of her equitable interest in real estate coming within the scope of the Act 35 Vict., c. 16, and yet to require the husband's concurrence in a conveyance of the legal estate.

Separate examination of wife abolished.

The necessity for the separate examination of the wife touching her consent to a conveyance of her real estate is now dispensed with. So far as the protection of the wife's interests was the object of this ceremony, it was well understood to be useless. If the execution of the conveyance was procurable by coercion, the acknowledgment or assertion of freedom from coercion was procurable by the same means. The provisions on the subject of separate examination, execution, and certification were formerly required to be strictly adhered to. Section 12, however, cures all defects occasioned by the absence or irregularity of the certificate, or by the defective execution or acknowledgment of the deed, provided the wife and husband have executed the conveyance, and provided the conditions contained in the 13th section have been fulfilled.

Wife may appoint an attorney to convey.

A married woman may now, by deed, appoint an attorney for the purpose of executing a conveyance on her behalf; but the power of an attorney, or the conveyance executed by the attorney,

a) 22 U. C. C. P., 467.

must also be executed by the husband, who must be a party thereto. SECTION 3.

Except where the Court of Chancery or other persons intrusted with lunatics are protector of the settlement in lieu of the husband, a judge may dispense with the concurrence of the husband in certain cases.

4. Except in the case of a married woman, where, by law, the Court of Chancery, or any person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot or of unsound mind, is, or are the protector of a settlement in lieu of her husband, if a husband be, in consequence of being a lunatic, idiot, or of unsound mind (and whether he be found such by inquisition or not) or be, from any other cause, incapable of executing a deed, or if his residence be not known, or he be in prison, or be living apart from his wife by mutual consent, or if there be, in the opinion of the judge, any other cause for so doing, a judge may, by an order to be made by him, in a summary way, upon the application of the wife, upon such evidence as to him shall seem meet, and either *ex parte* or upon such notice to the husband as he may deem requisite, dispense with the concurrence of the husband in any case in which his concurrence is required by this Act, or otherwise; and all acts, deeds, disclaimers, surrenders or powers of attorney done, executed or made by the wife, in pursuance of such order, in regard to her real estate, shall be done, executed or made by her in the same manner as if she were a *feme sole*, and when so done, executed or made by her shall be as good and valid as they would have been if the husband had become a party to and executed the same.

Imp. Act 3 & 4 W. 4., c. 74, s. 91.

This section has been adopted, with some modifications, from the 91st section of the Imperial Act 3 & 4 W. 4, c. 74.

Word "Judge."

The word "Judge" means a Judge of one of the Superior Courts, a Judge of a County Court, or a "Junior" or Deputy Judge(*a*). The Referee in Chancery Chambers is not a Judge within the meaning of this section(*b*).

(*a*) See section 2.
(*b*) Re Nolan, 9 Can. L. J. N. S., 313.

SECTION 4.

Decisions on Imperial Act.

The following decisions upon the Imperial Act will be found useful in construing this section :—

Land must be actually contracted to be sold.

It has been held that the 91st section of the Imperial Act gives no authority to the Court to grant an order dispensing with the concurrence of the husband in the sale or conveyance of the wife's land, unless the land is actually contracted to be sold or conveyed(*a*).

Discretion of Judge.

There seems to be considerable latitude allowed to the Judge in the exercise of his discretion. Thus, when the husband was a minor, and, therefore, incapable of executing a deed, the Court,

Infancy of husband.

under the Imperial Act(*b*), granted a rule to enable his wife to execute a conveyance of her separate property without his concurrence(*c*).

Husband lunatic.

If the husband be lunatic, the Court will not allow his wife to convey her separate estate without some explanation as to the nature of the lunatic's property, and whether or not it contributes

Support by husband must be denied.

to the wife's support(*d*). It must be shown, on an application founded on the alleged lunacy of the husband, either in express terms or by necessary implication, that the husband is lunatic at the time of the application(*e*).

Husband's absence from the country.

When it was shown that the husband, having fallen into distressed circumstances, had, two months before the application, left England for Australia, with the intention of never returning, and that he had ever since been living separate from his wife, the Court granted an order dispensing with his concurrence(*f*). And a similar order was granted when it appeared that the husband had absconded, and had not been heard of for twenty years, though it also appeared that the wife had in the meantime married again(*g*).

Absence must be permanent.

But where the husband is beyond the seas, it should be shown that he has absented himself under such circumstances as to induce the Court to infer that he has no intention to return to the country(*h*). When a husband had resided abroad for more than twenty years with another woman, the Court, on the application of his wife, authorized her to convey property settled to her separate use(*i*).

Order, when refused.

When the affidavit of the wife merely stated that the husband had entered a Government steamer, in January, 1844, and that the last she had heard of him was that in January, 1845, he was on board another Government steamer at New Zealand, and that she believed it was his intention never to return, the Court refused an application made in 1847 to dispense with the concurrence of the husband in the wife's conveyance(*j*).

(*a*) Ex parte Graham, 19 C. B. N. S., 370; 11 Jur. N. S., 468; 34 L. J. C. P., 321; 13 W. R., 782.
(*b*) 3 & 4 W. 4, c. 74, s. 91.
(*c*) In re Haigh, 2 C. B. N. S., 198; 3 Jur. N. S. 371; 26 L. J. C. P., 209.
(*d*) In re Cloud, 15 C. B. N. S., 833.
(*e*) In re Turner, 3 C. B., 166.
(*f*) In re Kelsey, 16 C. B., 197; 3 C. R., 37.
(*g*) Ex parte Yarnall, 17 C. B., 189.
(*h*) In re Squires, 17 C. B., 176; 25 L. J. C. P., 55. See also Ex parte Stone, 9 D. P. C., 843.
(*i*) Ex parte Shirley, 5 Bing. N. C., 226; 7 Scott, 174; 7 D. P. C., 258; 3 Jur., 125. See also Ex parte Gill, 1 Bing. N. C., 168.
(*j*) Ex parte Gilmore, 3 C. B., 967.

SECTION 4.

Husband absent as a seaman.

And where the husband was a seaman in the British Navy, on a foreign station, and the wife had not heard of him for two years, and the affidavits stated she believed he never would return, the Court held that the facts proved were insufficient(*a*). The mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead, was held insufficient to justify an order in the absence of some reasonable ground for presuming the statement to be true(*b*).

Support by husband must be denied.

On an application by a wife to dispense with the concurrence of her husband in a conveyance, on the ground that his residence is unknown, the affidavit must expressly state that he has not contributed to her support(*c*). And a similar affidavit is required where the application is made on the ground of the husband's desertion of his wife(*d*).

Husband and wife living apart.

When the husband and wife are living apart by mutual consent, it should be shown, on an application by the wife to dispense with the husband's concurrence in her conveyance, either that the husband has refused to concur, or that he has attached unreasonable or improper conditions to his concurrence. Thus, where the parties were living apart by mutual consent, and the husband refused to join in the execution unless part of the purchase money was paid to him, the Court dispensed with his concurrence(*e*). In another case(*f*), the Court refused to dispense with the concurrence of the husband, although it was stated that he and the applicant were living apart by mutual consent, and that he was in a very nervous and excitable state, and that it would be very difficult, if not impossible, to procure the execution by him of any deed, until it was sworn that an application had been made to him with that object and refused(*g*).

Husband must refuse to concur.

When the husband was living apart with another woman, within the jurisdiction, the Court required a direct application for his concurrence in the deed to be proved before granting an order(*h*).

Living apart.

The mere allegation that the wife had left her husband in consequence of his violence, and was living apart from him, was considered insufficient to justify an order(*i*).

Order refused if husband supports his wife.

An order will not be granted where it appears that the husband is in correspondence with his wife, and remits her sums of money, however small, for her support(*j*); and the Court usually requires an affidavit negativing the wife's receipt of any allowance from her husband(*k*).

When husband and wife are living apart by mutual consent, the

(*a*) In re Smith, 16 L. J. C. P., 312.
(*b*) Ex parte Taylor, 7 C. B., 1.
(*c*) In re Carburton, 16 W. R., 84.
(*d*) Ex parte Robinson, L. R. 4 C. P., 205.
(*e*) In re Woodcock, 1 C. B., 437. See also In re Perrin, 14 C. B., 420; Ex parte Frenery, 1 C. B. N. S., 187.
(*f*) In re Murphy, 2 D. N. S., 110; 5 Scott N. S., 166; 4 M. & G., 636.
(*g*) As to what constitutes "living apart," see In re Rogers, 11 Jur. N. S., 1038; 14 W. R., 142; 13 L. T. N. S., 437; 1 L. R. C. P., 47.
(*h*) Ex parte Parker, 3 C. L. R., 148.
(*i*) In re Price, 13 C. B. N. S., 286; 7 L. T. N. S., 327.
(*j*) In re Squires, 17 C. B., 176; 25 L. J. C. P., 55.
(*k*) Ex parte Fish, 9 C. B. N. S., 715; 3 L. T. N. S., 631; In re Fletcher, 17 W. R., 319.

SECTION 4.

Court, before granting an order, requires an explanation of the cause of separation(*a*).

Wife must make affidavit.

What affidavit must state.

On an application to obtain an order dispensing with the husband's concurrence, the wife herself must make an affidavit as to the facts(*b*). The affidavit must describe the applicant as "wife of," &c., even though it discloses circumstances showing a well-grounded belief that the husband is dead(*c*). If, therefore, the affidavit describes the applicant as a "widow"(*d*), or as "wife or widow"(*e*), it cannot be received. The affidavit must contain the addition or description of the husband( ), and must negative any communication from him(*g*).

Form of conveyance.

The Court will not sanction a particular form of conveyance by a married woman(*h*).

Concluding words of sec. 4.

The concluding words of section 4 cannot be construed as giving to the conveyance executed by the wife any effect upon any estate or interest of the husband in the property conveyed. Her conveyance can affect her own interest only.

Form of order.

5. Such order may be in the form following, or to the like effect.

"THE MARRIED WOMAN'S REAL ESTATE ACT, 1873."

Upon application of *A B* of the wife of *C D* of (or formerly of, etc.) I, one of the Judges of the Court of Queen's Bench for Ontario *(or as the case may be)* do, pursuant to "The Married Woman's Real Estate Act, 1873," order that the said *A B* may, in the same manner, and with the same effect as if she were a *feme sole*, bargain, sell and convey (or appoint an attorney or attorneys to bargain, sell and convey) all or any part of her estate, title and interest of, in, to or out of all and singular *(describe the premises)*.

Dated this day of A.D.

(*Signature of Judge*).

It is not necessary that the form given in this section should be strictly adhered to. The order may be "to the like effect." No

(*a*) In re Williams, 2 Scott N. R., 120; 1 M. & G., 881; 9 D, P. C., 72; Ex parte Bruce, 9 D. P. C., 840; 3 Scott N. R., 592.
(*b*) Ex parte Eardley, 25 L. T. N. S., 804.
(*c*) Ex parte Sparrow, 12 C. B., 334.
(*d*) In re Noy, 7 Scott, W. R., 434.
(*e*) In re Anderson, 2 C. B. N. S., 811.
(*f*) In re Gardner, 1 C. B. N. S., 215.
(*g*) In re Horsefall, 1 M. & G., 132.
(*h*) In re Woodall, 3 C. B., 639.

argument is required, however, to show the expediency of adhering to the form given, whenever practicable. SECTION 5.

6. Such order may be in duplicate or as many parts as may be necessary, and shall be signed by the judge, and may be registered in the registry office of the county wherein the lands to which the same relates are situate, upon its production and deposit without any proof thereof, and such registration may take place either before or after the execution of the deed which shall be made in pursuance of such order. Order may be registered.

7. Such order may, if desired, be endorsed or written upon the deed to which the same relates, in which case it shall be registered as part of the deed. Order may be endorsed or written upon the deed.

An order written upon a separate piece of paper and annexed to the deed would probably not be held to have been indorsed or written upon the deed to which it relates. Section 10 dispenses with the necessity for describing the real estate to be conveyed in the order authorizing the conveyance, if the order is indorsed or written upon the deed; and it would therefore, for obvious reasons, be highly inexpedient to hold that an order annexed to the deed should be considered to have been indorsed or written upon it. Mode of writing order.

8. For the registration of such order, including all necessary entries and certificates, the Registrar shall be entitled to a fee of one dollar, unless the order be endorsed or written upon the deed, in which case no fee shall be payable in respect of the registration thereof. The fee for registration of order.

9. For every such order including every duplicate or other part thereof, the judge shall be entitled to his own use to a fee of two dollars; but no other fee or charge of any kind shall be payable in respect thereof, either to the clerk, fee fund or otherwise. Judge's fee for order. No other fee or charge to be payable.

10. If such order be endorsed or written upon the deed to be made in pursuance thereof, the real estate to If order endorsed or written on deed, how real estate may be described.

SECTION 10.

which the same relates may be described in the order by reference to the description contained in the deed.

The powers of conveying given by this Act to a married woman not to interfere with any other power.

11. The powers of conveying given by this Act to a married woman shall not impair or affect any powers which independently of this Act, may either by statute, contrac t or settlement be vested in or limited or reserved to her so as to prevent her from exercising such powers in any case, except so far as by any conveyance made by her under this Act, she may be prevented from so doing in consequence of such powers having been suspended or extinguished by such conveyance.

The construction to be placed on Section 11 has already been considered in the notes to section 3.

Defective conveyances to be valid.

12. Every conveyance heretofore executed by a married woman of or affecting her real estate, in which her husband shall have joined, is and shall be taken and adjudged to be valid and effectual to have passed the estate which such conveyance professed to pass of such married woman in the said real estate, notwithstanding the absence or want of a certificate of her consent to convey the same; and notwithstanding any irregularity, informality, or defect in the certificate (if any); and notwithstanding that such conveyance may not have been executed, acknowledged or certified as required by any Act now or heretofore in force respecting the conveyance of real estate by married women, or shall not have been executed by the married woman in presence of her husband, or on the same day on which or at the same place where such conveyance shall have been executed by her husband.

12th and 13th sections must be construed together.

The 12th and 13th Sections must be read and considered together. The 12th section, subject to the exceptions contained in the 13th section, cures all defects in conveyances heretofore executed by married women arising from the absence or want of a certificate of consent, or from defective execution, acknowledgment, or certification, provided the husband shall have joined in such conveyance.

The 13th section is intended for the protection of persons who have acquired title by deed duly executed subsequently to the execution of such defective conveyance. This protection, however, does not seem to be sufficiently ample. If, for example, six years before the passing of the Act, a defective conveyance had been made by a married woman to a purchaser, who had thereupon entered and had remained in possession ever since; and if, a year after such conveyance, the married woman had duly conveyed to a mortgagee, to whom a right of entry had not since accrued, it would be manifestly unjust that the mortgagee's title should be defeated by the Act; yet such would seem to be the effect of the Act, which makes no provision for the protection of those having a lien or incumbrance on the land without the right to possession. SECTION 12.

Certain titles not to be prejudiced.

13. Nothing in this Act contained shall render valid any conveyance to the prejudice of any title, subsequently to the execution of such conveyance and before the passing of this Act acquired from the married woman by deed, duly executed and certified as by law required, unless the actual possession or enjoyment of the real estate conveyed or intended to be conveyed by the prior conveyance shall have been had at any time subsequent thereto by the grantee therein, or those claiming by, from or under him, and he or they shall have been in such actual possession or enjoyment continuously for the period of three years before the passing of this Act, and he or they is or are at the time of the passing of this Act in the actual posession or enjoyment thereof; and nothing in this Act contained shall render valid any conveyance from the married woman which was not executed in good faith, or any conveyance of land of which the married woman or those claiming under her, is or are in the actual possession or enjoyment contrary to the terms of such conveyance.

Con. Stat. U. C. c. 85, ss. 1, 5, 6, 7 and 8, and 34 Vic., c. 24 (Ontario) ss. 1, 2, 3, 4 and 5, repealed.

14. Sections one, five, six, seven, and eight of chapter eighty-five of the Consolidated Statutes for Upper Canada, and sections one, two, three, four, and five of an Act passed in the thirty-fourth year of Her Majesty's reign, chaptered twenty-four are hereby repealed.

See note to section 12.

APPENDIX.

AN ACT

RESPECTING THE

CONVEYANCE OF REAL ESTATE

BY

MARRIED WOMEN.

CONSOL. STAT. U. C., CAP. LXXXV.

Married women of full age may convey.

1. Any married woman seized of or entitled to Real Estate in Upper Canada, and being of the age of twenty-one years, may, subject to the provisions hereinafter contained, convey the same, by Deed to be executed by her jointly with her husband, to such use and uses as to her and her husband may seem meet. 59 G. 3, c. 3, s. 1,—2 G. 4, c. 14. (*Repealed by* 36 *Vict. c.* 18, *s.* 14.)

How to convey in Upper Canada.

2. In case such married woman executes such Deed in Upper Canada, she shall execute the same in the presence of a Judge of one of the Courts of Queen's Bench or Common Pleas, or of a Judge of the County Court, or of two Justices of the Peace for the County in which such married woman resides or happens to be when the Deed is executed, and such Judge or two Justices of the Peace (*as the case may be*) shall examine such married woman apart from her husband respecting her free and voluntary

SECTION 2. consent to convey her Real Estate in manner and for the purposes expressed in the Deed, and if she gives her consent, such Judge or Justices shall, on the day of the execution of such Deed, certify on the back thereof to the following effect: 59 G. 3, c. 3, ss. 2, 3,—1 W. 4, c. 2, s.1,—2 V. c. 6, s. 1,—14, 15 V. c. 115.

"I, (*or* we, *inserting the name or names, &c.*) do hereby "certify that on this day of "at the within Deed was "duly executed in my (*or* our) presence by A.B., of "_____, wife of _____, one "of the grantors therein named, and that the said wife of "the said _____, at the said time and "place being examined by me (*or* us) apart from her husband, did appear to give her consent to convey her estate in the lands mentioned in the said Deed freely and "voluntarily and without coercion or fear of coercion on "the part of her husband or of any other person or persons whatsoever." (*Repealed by* 34 *Vict. c.* 24, *s.* 1.)

How in Great Britain or Ireland or in the colonies.

3. In case any such married woman resides in Great Britain or Ireland, or in any Colony belonging to the Crown of Great Britain other than Upper Canada, and there executes any such Deed, she shall execute the same in the presence of the Mayor or Chief Magistrate of a City, Borough or Town corporate in Great Britain or Ireland, or of the Chief Justice or a Judge of the Supreme Court of such Colony; and such Mayor or Chief Magistrate, Chief Justice or Judge (*as the case may be*) shall examine such married woman, apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act, and if she thereupon gives such consent, such Mayor or Chief

Magistrate, under his hand and the seal of the City, Town or Borough, or such Chief Justice or Judge under his hand, shall, on the day of the execution of such Deed, certify on the back thereof to the effect hereinbefore mentioned in the said second section. 59 G. 3, c. 3, ss. 2, 5—1 W. 4, c. 2, s. 1,—2 V. c. 6,—14, 15 V. c. 115. (*Repealed by* 34 *Vict. c.* 24, *s.* 1.) SECTION 3.

4. In case any such married woman resides either temporarily or permanently in any State or Country not owing allegiance to the Crown of Great Britain, and there executes any such Deed, she shall execute the same in the presence of the Governor or other Chief Executive Officer of such State or Country, or in the presence of the British Consul resident in such State or Country, or in the presence of a Judge of a Court of Record in such State or Country, and such Governor, Chief Executive Officer, Consul or Judge *(as the case may be)* shall examine such married woman apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act; and if she thereupon gives such consent, such Governor or Chief Executive Officer, under his Hand and the Seal of such State or Country, or such Consul under his Hand, or such Judge under his hand and the Seal of his Court, shall certify to the effect hereinbefore mentioned in the said second section. 59 G. 3, c. 3, s. 2,—1 W. 4, c. 2, s. 1,—2 V. c. 6,—14, 15 V. c. 115. *(Repealed by* 34 *Vict. c.* 24, *s.* 1.) How in foreign States.

5. Every certificate given under this Act shall be *primâ facie* evidence of the facts therein stated. 14, 15 V. c. 115, s. 2. (*Repealed by* 36 *Vict. c.* 18, *s.* 14.) Certificate to be evidence *prima facie.*

6. It shall not be necessary for any Judge or other Officer who may certify in any of the foregoing cases, to The officer certifying need not attest as a witness.

SECTION 6. attest as a subscribing witness, the execution of any Deed upon the back of which he may so certify. 14, 15 V. c. 115, s. 1. (*Repealed by* 36 *Vict. c.* 18, *s.* 14.)

If not duly executed the Deed shall not be valid.

7. If any such Deed of any such married woman be not executed, acknowledged and certified as aforesaid, the same shall not be valid or have any effect. 14, 15 V. c. 115, s. 2,—1 W. 4, c. 2, s 1,—59 G. 3, c. 3, s. 5. (*Repealed by* 36 *Vict. c.* 18. *s.* 14.)

The Deed not to have greater effect than if she was sole.

8. No Deed of a married woman executed according to the provisions of this Act shall have any greater effect than the same would have had if such married woman had been sole. 1 W. 4, c. 2, s. 2. (*Repealed by* 36 *Vict. c.* 18, *s.* 14.)

Fee for certificate.

9. The sum of one dollar may be demanded for every such certificate. 59 G. 3, c. 3, s. 2,—1 W. 4, c. 2, s. 4.

Recital.

10. And whereas it is expedient to provide for cases in which, before the Fourth day of May, one thousand eight hundred and fifty-nine, informal or erroneous certificates had been indorsed upon deeds conveying real estate executed by married women jointly with their husbands, as well as for cases in which such Deeds had been executed in presence of and certificates endorsed thereon by non-resident Justices of the Peace, or in which certificates had been endorsed on such Deeds subsequent to the execution thereof: Therefore, whenever any certificate on the back of any Deed executed before the said Fourth day of May, one thousand eight hundred and fifty-nine, by any married woman, pursuant to the Act of the Parliament of Upper Canada, passed in the first year of the Reign of his late Majesty King William the Fourth, chapter two, or pursuant to the Act of the said Parliament of Upper Ca-

Certificate under former Acts to be valid, tho' the Justices were not resident in the County or District in which the married woman resided.

nada, passed in the second year of Her Majesty's Reign, chapter six, has been signed by two Justices of the Peace, such certificate shall be held and is hereby declared to be valid and effectual for all the purposes contemplated by said Acts, although the said Justices were not at the time residents of the District or County in which such married woman resided; and every Deed executed before the said fourth day of May, one thousand eight hundred and fifty-nine, in the presence of such Justices, and every such certificate so signed shall have the same force, validity and effect as if the said Deed had been executed in the presence of, and such certificate had been signed by two Justices of the Peace of the District or County in which such married woman at the time of the execution thereof resided. 22 V. c. 35, (1859) s. 1. SECTION 10.

11. When any certificate on the back of any Deed executed by any married woman, pursuant to the Act in the last preceding section first mentioned, had, before the said Fourth day of May, one thousand eight hundred and fifty-nine, been given on any day subsequent to the execution of such Deed, such certificate shall be deemed and be taken to have been given on the day on which the said Deed was executed; and such Deed shall be as good and valid in law as if such certificate had been in fact signed on the day of the execution of the Deed to which it relates, as required by the said Act. 22 V. c. 35, s. 2. Certificate to be valid tho' given subsequent to the execution of the deed.

12. In case any married woman seized of or entitled to real estate in Upper Canada, and being of the age of twenty-one years, did, before the said Fourth day of May, one thousand eight hundred and fifty-nine, execute, jointly with her husband, a Deed for the conveyance of the same, knowing her estate therein and intending to convey Deed executed by a married woman jointly with her husband to be a good conveyance notwithstanding errors in certificate endorsed.

SECTION 12.

the same, such Deed shall be taken and considered as a valid conveyance of the land therein mentioned, and the execution thereof shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the said land, although a certificate of her consent to be barred of her right of Dower of and in such land, instead of a certificate of her consent to convey her estate in the same, was endorsed thereon. 22 V. c. 35, s. 3.

And notwithstanding the certificate be not in strict conformity to the forms in the said Acts.

13. Whenever, before the fourth day of May, one thousand eight hundred and fifty-nine, the requirements of the Acts of the former Parliament of Upper Canada, or of the Parliament of the Province of Canada, respecting the conveyance of real estate in Upper Canada by married women, while respectively in force, had been complied with on the execution by any married woman of a Deed of conveyance of real estate in Upper Canada then belonging to such married woman, such execution shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the land intended to be conveyed, although the certificate endorsed on such Deed be not in strict conformity with the forms prescribed by the said Acts, or any or either of them. 22 V. c. 35, s. 4.

Act not to prejudice titles subsequently acquired, &c.

14. The four last preceding sections of this Act shall not render valid any conveyance to the prejudice of any title subsequently acquired from the married woman, by Deed duly executed and certified as by law required, nor any conveyance from the married woman which was not executed in good faith, nor any conveyance of land of which the married woman or those claiming under her was or were in the actual possession or enjoyment on the said Fourth day of May, one thousand eight hundred and fifty-nine, notwithstanding such conveyance. 22 V. c. 35, s. 5.

SECTION 15. Requirements formerly necessary, to continue to be so as to future conveyances.

15. The requirements necessary to give validity at law to a conveyance by a married woman of any of her real estate with respect to Deeds of conveyance executed since the Fourth day of May, one thousand eight hundred and fifty-nine, or after the passing of this Act, shall continue to be necessary for that purpose notwithstanding any thing contained in the five last preceding sections of this Act; But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman executed since the said Fourth day of May, one thousand eight hundred and fifty-nine, or which may after this Act takes effect be executed in respect of her real estate. 22 V. c. 35, s. 6. (1859.)

AN ACT

TO AMEND

THE REGISTRY ACT,

AND TO FURTHER PROVIDE AS TO THE

CERTIFICATES OF MARRIED WOMEN,

TOUCHING THEIR CONSENT AS TO THE

EXECUTION OF DEEDS OF CONVEYANCE.

ONT. STAT., 32 VICT., CAP. IX.

[*Assented to* 19*th December*, 1868.]

One certificate may embrace several names.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace therein mentioned, may include the examination and names of all or any number of such married women, in one certificate in the form mentioned and set out in the said section as far as applicable. (*Amended by* 34 *Vict.*, *c.* 24, *s.* 5.)

AN ACT

To amend Chapter Eighty-five of the Consolidated Statutes for Upper Canada, intituled "An Act respecting the Conveyance of Real Estate by Married Women," and the Act passed in the thirty-second year of the Reign of Her Majesty, chaptered nine, intituled "An Act to amend the Registry Act, and to further provide as to the Certificates of Married Women, touching their Consent as to the Execution of Deeds of Conveyance."

ONT. STAT., 34 VICT., CAP. XXIV.

[*Assented to* 15*th February*, 1871.]

Preamble.

WHEREAS it is expedient to facilitate the taking the necessary examination of a married woman, as by law required, on executing a deed of lands and the granting the necessary certificate thereon: Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Con. Stat. U C. c. 85, ss. 2, 3 and 4 repealed.

1. Sections two, three and four of chapter eighty-five, of the Consolidated Statutes for Upper Canada, are hereby repealed, and sections two, three, and four of this Act are inserted in lieu thereof. (*Repealed by* 36 *Vict., c.* 18, *s.* 14.)

Execution of deeds by married women in Ontario.

2. In case such married woman executes such deed in the Province of Ontario, she shall execute the same in the

SECTION 2.

presence of a Judge of one of the Courts of Queen's Bench, Common Pleas, or the Court of Chancery, or of the Judge, Junior or Deputy Judge of the County Court, or of a Notary Public for the Province of Ontario, or two Justices of the Peace for the county in which such married woman happens to be when the deed is executed, and any such Judge, Notary Public, or two Justices of the Peace shall examine such married woman apart from her husband respecting her free and voluntary consent to convey her real estate as expressed in the deed, and if she gives her consent, such Judge or Justices, or Notary Public under his seal of office, shall on the day of execution by her of such deed, certify on the back thereof to the following effect:

"I, (*or* we *inserting the name or names, and place of "residence, &c.*), do hereby certify that on this "day of A. D., at in the "County of , the within deed was duly "executed in my (*or* our) presence by A. B., of , "wife of therein named, and that the said wife "(*or* wives) of the said (*insert name of husband or hus-"bands*) at the said time and place, being examined by "me (*or* us) apart from her (*or* their) husband (*or* hus-"bands), did give her (*or* their) consent to convey her (*or* 'their) estate in the lands mentioned in the said deed, "freely and voluntarily, and without coercion or fear of "coercion on the part of her (*or* their) husband (*or* hus-"bands), or of any other person or persons whomsoever.' (*Repealed by* 36 *Vict., c.* 18, *s.* 14.)

In Great Britain, Ireland, or the colonies.

3. In case any such married woman executes any such deed in Great Britain or Ireland, or in any colony belonging to the Crown of Great Britain, out of Ontario, she

shall do so in the presence of the Chief Justice or a Judge of the Superior Court or a Notary Public duly appointed, or of the Mayor or Chief Magistrate of a city, borough or town corporate, or any person authorized by the laws of any such colony for that purpose, who shall examine such married woman apart from her husband, touching her consent in the manner, and certify on the back thereof to the effect, as by the second section of this Act is required. (*Repealed by* 36 *Vict., c.* 18, *s.* 14.) SECTION 3

4. In case any such married woman executes any such deed in any state or country not owing allegiance to the Crown of Great Britain, she shall do so in the presence of the Governor or other chief executive officer, or the resident British Consul, or of a Judge of a Court of Record of such state or country, or of a Notary Public duly appointed, or of a Mayor or Chief Magistrate of a city, borough, or town corporate in any such foreign country, who shall examine such married woman apart from her husband touching her consent in the manner, and certify on the back thereof to the effect, as by the second clause of this Act is required; such certificate to be under the hand and the seal used in the office of the person or court by the person so making such examination; Provided always, that no party to any such deed or engaged in the preparation thereof, either by himself, his partner or clerk, shall make the examination or grant the certificate required by any of the foregoing clauses under a penalty of four hundred dollars, to be recovered from him, her, or them, by any person suing therefor in any court of competent jurisdiction. (*Repealed by* 36 *Vict., c.* 18, *s.* 14.) In foreign countries. Proviso

5. Sections one and two of the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine, 32 Vic., c. 9, ss 1 and 2 amended

SECTION 5. is amended by expunging from section one the words: "any Judge or Justice of the Peace," and from section two the words "the Judge or Justice of the Peace therein mentioned," and inserting in lieu thereof in each of such sections the words "any of the parties entitled by law to take such examination." (*Repealed by* 36 *Vict., c.* 18, *s.* 14.)

32 Vic., ch. 9, all former discharges of mortgage confirmed.

6. The following shall be inserted as clause three of said last mentioned Act, and incorporated therewith: "All certificates of discharge of mortgage and the registering thereof, executed or registered previous to the passing of this Act, according to the terms thereof, shall be as valid and binding as if done since the passing hereof."

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ACKNOWLEDGMENT. *See* CONVEYANCE BY WIFE.
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ADDENDUM.

Page 44, Note (*a*).

The reader will find in vol. 10 Can. L. J. N. S, 179, an American case, "*Re* Julia Lyons," in which it was held that in a State where the statute law makes a married woman, living apart from her husband, liable to be sued in all actions as if sole, she may be proceeded against under the Bankrupt law.

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